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ABSTRACT

Designed to serve as a framework from which high school debate students, coaches, and judges can evaluate the issues, arguments, and evidence present in sustaining and reforming the U.S. justice system, this booklet provides debaters with guidelines for research on the 1983-84 debate resolutions selected by the National University Continuing Education Association's Committee on Discussion and Debate. Following the presentation of the problem area and the three resolutions, the book's five chapters cover: (1) getting started, a review of useful information on researching the topic of the U.S. justice system; (2) an overview to the U.S. justice system; (3) the criminal investigation resolution; (4) the civil court procedure; and (5) the criminal court procedure. (JL)

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ERIC First Analysis: The United States Justice System

1983–84 National High School Debate Resolutions

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Foreword

Questions of justice are fundamental to a democracy. Debaters will be applying their attitudes and insights about the United States justice system throughout their adult life. The student who debates about civil courts needs to know the similarities and differences that civil courts have to the criminal courts; students debating about law enforcement procedures need to know how these regulations influence the administration of justice during trials. Since all three topics are interrelated, students will gain from applying the analysis in this book to the development of their actual cases. The *ERIC First Analysis* should serve as a framework from which students, coaches, and judges can evaluate the issues, arguments, and evidence present in sustaining and reforming the justice system.

ERIC First Analysis, published annually since 1973, provides debaters with guidelines for research on the debate resolutions selected by the National University Continuing Education Association's Committee on Discussion and Debate. It incorporates an instructional approach designed to avoid "structured" cases and "canned" evidence. Periodic surveys of teachers of debate have indicated that the *ERIC First Analysis* has proved to be an excellent resource for students to begin their study of issues and arguments.

The *ERIC First Analysis* of the 1983–84 National High School Debate Resolutions is published by the Speech Communication Association in cooperation with the Educational Resources Information Center Clearinghouse on Reading and Communication Skills (ERIC/RCS). The ERIC/RCS Clearinghouse is supported by the National Institute of Education which has as one of its missions the dissemination of knowledge to improve classroom practices. This ERIC information analysis paper is unique in that it is intended for direct use by high school students as well as by their teachers.

To be a "first" analysis, the manuscript must be prepared in a period of six weeks after the February announcement of the national debate topic. The author's thorough analysis of issues and sources in so short a time and his adaptation of the analysis to the needs of high school debaters are tributes to his experience and excellence as a forensics educator.

Don M. Boileau
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1983–84 High School Debate Problem Area and Resolutions

What changes are most needed
in the procedures used in the United States
justice system?

Debate Resolutions

Resolved: That the United States should adopt uniform rules governing the criminal investigation procedure of all public law enforcement agencies in the nation.

Resolved: That the United States should establish uniform rules governing the procedure of all civil courts in the nation.

Resolved: That the United States should establish uniform rules governing the procedure of all criminal courts in the nation.

Preface

The purpose of this publication is to provide a brief overview of the 1983–84 high school debate resolutions. The decision-making process for selecting the problem area and resolutions is different from the system used for determining the college debate topic. Last December in San Diego, the National University Continuing Education Association (NUCEA) Committee on Discussion and Debate offered three problem areas and nine resolutions for consideration. After four weeks of balloting by the various state and national forensic representatives, the topic area of the United States justice system won the referendum. The final resolution, however, will not be determined until December although an early preference has been shown for the criminal procedure topic. All of the specific resolutions are closely related to each other, and some case areas are interchangeable.

Whichever resolution is finally selected, the debater will have a tremendous amount of research material to assimilate. The five chapters of this book are intended to prepare debaters for their own efficient investigation of the problem area. The five chapters are: (1) getting started, a review of useful information on researching the topic of our justice system; (2) an overview to the U.S. justice system; (3) the criminal investigation resolution; (4) the civil court procedure; and (5) the criminal court procedure. Following the final chapter are footnotes for each chapter.

Since this text was written early in the debate year, it can hardly encompass all possible cases that could be developed under any of the resolutions. This publication should be used to establish early research priorities on the most likely affirmative and negative arguments. Also, it provides a general overview of the kinds of issues likely to be discussed under the justice topic.

The opinions expressed in this work do not represent the official position of either the NUCEA or of the Speech Communication Association. In most instances the consensus view of debate theory or the justice system is presented, which may not represent the personal view of the author. As a general rule, this text emphasizes the practical rather than the exotic, the likely rather than the unlikely.

All the planning and directing of research assignments for this publication were done by the author. However, Carl Douma, a graduate student at California State University, Sacramento, was invaluable in securing documents, offering suggestions on potential case arguments, and preparing material for the chapter on criminal investigations. Editing and proofreading assistance was gratefully accepted from Christine Wagner.

The task of compiling the material and finishing the manuscript under rigorous time constraints has been made easier by the patience and understanding of both my family and the staff, students, and faculty of the Department of Communication Studies of California State University. The information in this publication is intended to benefit debaters and coaches, and to introduce an exciting topic of vital importance to audiences and judges alike.

David L. Wagner

Author's Dedication

The 1983–84 ERIC First Analysis: The United States Justice System

is dedicated to

Lucy A. Keele, Professor of Speech Communication
California State University, Fullerton

In appreciation for the many years of active leadership in debate at both the high school and college level.

1. Getting Started

The next four chapters will provide information on various aspects of the United States justice system as well as each of the three specific debate resolutions that represent parts of that system. A number of contemporary issues are highlighted by a focus on these recurring issues of crime, punishment, and restitution. Behind the popular call for getting tough with criminals lie the deeper issues of reform of the entire justice system. Not only will research on the justice system provide debaters with information on a volatile topic of current interest, but it will also introduce them to the terminology and procedures of the legal system where many forensic competitors hope to find professional careers.

This publication provides an overview of many of the major issues confronting Congress and state legislatures as they discuss the reform of the criminal justice system. However, the more lengthy process of ongoing research and issue development must be placed with each debater who must devise an in-depth research plan. A common complaint often heard is that some debaters fail to develop the library skills necessary for accumulating new evidence. This chapter provides a brief review of a systematic process for researching policy issues.

The Beginning

A basic first step in the process of library research is to develop a method for discovering those topic areas that require priority attention. This publication encourages the "brainstorming" technique often used by business or academic groups to generate ideas. Such an approach adapts easily to the needs of debate squads. Coaches and debaters should discuss possible case areas and issues likely to emerge on the justice topics. This exchange should encourage all members of the group to volunteer information or contribute their ideas. The rules are easy to establish: (1) evaluation and criticism by group members are forbidden, (2) all contributions are to be encouraged, (3) an attempt is made to create the greatest quantity of ideas, and (4) a combination of ideas and solutions is sought.[1] A master list for the squad should be kept on concepts for cases, topicality arguments, and potential advantages or disadvantages.

This debate squad session does not have to be totally unstructured. The quality of the exchange would be enhanced if a few general articles on current issues of crime and the courts were read first. Another preliminary step is to

review other debate topics for similarities to this year's resolution. For example, within the last ten years, two high school topics have dealt with criminal justice reform, and, within the last six years, two college topics have touched on criminal investigation or on media effects on the justice system. Many of the issues raised under these resolutions continue to be relevant to analysis of these topics.

Research Procedures

Once a list of concepts has been accumulated, it becomes necessary to organize research assignments. A number of questions must be considered when making such assignments. Is it important to research an affirmative case first? What areas can be covered with the sources readily available? What cases are likely to be run early in the year? Answers to questions like these will determine which ideas must be considered primary research objectives.

After a preliminary list has been developed, the most systematic method of researching is to compile brief bibliographies on each of the major issues or case areas. Although some debaters are good at chasing down obscure footnotes in books or intuitively finding useful publications, the best and most comprehensive method is to consult the library card catalog for books and indexes for periodicals or journals. The justice system provides a unique opportunity to utilize a wide variety of library resources. If the amount of reference material seems overwhelming, several options are available to the debater.

First, most libraries have trained reference librarians who will give assistance if requested. Second, various books explain reference sources in greater detail. Good examples of this are *The New York Times Guide to Reference Materials*,[2] *Government Publications and Their Use*,[3] and *Guide to Reference Books*.[4] In particular, several books are devoted exclusively to legal research that might prove particularly useful to studying this year's topic. Examples of these handbooks include Peter Honigsberg's *Cluing into Legal Research*, Erwin Pollack's *Fundamentals of Legal Research*, or Miles Price's *Effective Legal Research*. A third option is having a research service compile a bibliography on selected topics. A fee is charged by many university libraries or research organizations for computer retrieval of this information.

Indexes and Abstracts

Most indexes or abstracts are organized topically by subject headings and by author. While an index supplies basic information on when and where an article was published, abstracts offer the added attraction of providing a short summary of the publication. Typical subject headings of the justice resolutions include sentencing, jury, bail, testimony, evidence, polygraph, exclusionary rule, capital punishment, police, search and seizure, and courts.

The Reader's Guide to Periodical Literature is perhaps the most widely available resource index in the United States. Available in most public and school libraries, this research aid surveys over 150 popular magazines covering

issues with current news value. Other more specialized indexes also should be consulted. A standard reference work for legal journals is the *Index to Legal Periodicals*. This publication is printed numerous times during the year and is the most important single source indexing American legal periodicals. In addition to subject and author indexes, there are also book review and table of cases indexes available. The *Public Affairs Information Service (PAIS)* abstracts over 1,000 government and business publications. The *Monthly Catalog of U.S. Government Publications*, an indispensable guide to government reports, is an extremely valuable research aid for this year's topic.

Nationally distributed newspapers also provide indexes to their publications. The *New York Times*, *Los Angeles Times*, *Christian Science Monitor*, *Washington Post*, and *Wall Street Journal* are all respected papers with indexing systems available in many libraries. While most local newspapers will not have published indexes available, some libraries will clip articles on important topics. Also, *NewsBank* collects articles from local papers and places them on microfiche. Other special indexes should prove useful for a careful consideration of the justice system. Among them are

Communication Abstracts. Published four times annually by Sage Publications, Inc., this service supplies evaluation of communication related articles, reports, and books from a variety of sources. Subjects include conflict resolution, jury processes, media effects, press freedom, and videotape.

Criminal Justice Abstracts. Lengthy abstracts of both domestic and foreign criminal justice journals. In addition, each issue contains articles on current topics about the justice system.

The Criminal Justice Periodical Index. This detailed indexing system published since 1975 covers an extensive list of criminal justice journals.

Psychology Abstracts. Monthly updates containing summaries from over 850 journals, books, or magazines related to the field of psychology are provided by this abstracting service.

Social Sciences Citation Index. This difficult-to-use index is one of the best author indexes in social science research. The skilled user of this publication can trace references to important scholars through numerous journal articles.

Social Sciences Index. Quarterly updates of over 270 periodicals and journals devoted to examining major issues in the social sciences. Typical topic headings for this year's research would include jury, eyewitness testimony, jury instructions, polygraph evidence.

Sociological Abstracts. This abstract covers a broad range of domestic and foreign journal articles related to the field of sociology.

Sources

The preferred method for systematic research on any topic is extensive use of indexes or abstracts. However, a time lag exists between the publication date for journals or periodicals and their inclusion in various indexing schemes. Any of the three potential topic areas, especially those based on court cases, has the potential for dramatic changes on a weekly basis. One way to ensure

that research remains current is to examine unbound copies of such popular news weeklies as *Newsweek*, *Time*, or *U.S. News and World Report*. Debaters should also read the local papers for timely information.

Other publications that may be less well-known to the debater but are important sources of evidence include the *Congressional Record*, which is the official account of the activities of Congress. *Current History* devotes several summer issues to articles on the high school topic. In addition to these publications, there are many works that contain a number of articles relating to the justice topic. A sample includes

American Bar Association Journal. Published monthly by the American Bar Association (ABA), the journal contains not only articles of interest on the U.S. justice system but also editorial comments and information on recent legal developments. A review of this journal should be a high priority item on a research list.

American Journal of Criminal Law. Published three times a year by the University of Texas School of Law, this journal offers both articles and notes on a variety of criminal procedure issues.

Crime Control Digest. Published weekly by the Washington Crime News Service, this bulletin contains a wealth of current information on police and other aspects of the criminal justice system.

Criminal Justice Review. Published quarterly by the College of Public and Urban Affairs of Georgia State University Atlanta, this review presents a broad view of criminal justice issues from both the practical and theoretical perspectives.

Criminal Law Bulletin. This bimonthly publication usually contains three or four articles on selected issues of interest to the professional in the criminal justice system.

Harvard Civil Rights and Civil Liberties Law Review. This publication of the Harvard Law School contains scholarly articles, commentaries, and comments devoted to important issues in criminal law and procedure.

Human Rights. This quarterly journal is published by the ABA for its Individual Rights and Responsibilities law section. It contains articles on various legal issues associated with all three debate resolutions.

Journal of Criminal Justice. Affiliated with the Academy of Criminal Justice Services, this bimonthly publication covers both domestic and international issues related to the field of criminal justice.

Journal of Criminal Law and Criminology. Published by the Northwestern University School of Law, this journal contains numerous articles on criminal law and procedure.

Judicature. Published ten times a year by the American Judicative Society, this journal contains articles on the court, judges, and lawyers.

Juvenile and Family Court Journal. Published quarterly by the National Council of Juvenile and Family Court Judges at the University of Nevada at Reno, this journal covers issues of concern in the field of juvenile justice and delinquency.

Police Magazine. A bimonthly publication of the Criminal Justice Publication, Inc., this source contains short articles of interest to law enforcement personnel.

In addition to these sources, topics involved with the justice system also invite use of various legal encyclopedias for obtaining information on general aspects of the law. The two most widely used multi-volume summaries are *American Jurisprudence* and *Corpus Juris Secundum*. Each section is exhaustively footnoted and periodic supplements keep the information current. There is also an extensive table of contents and index available for each volume. A summary specifically devoted to criminal justice issues is the *Encyclopedia of Criminology* by Vernon Branham. Entries in this enclyclopedia are of article length with a separate bibliography on each subject. Yet another source of exposition on specific aspects of the law is the treatise or handbook. These texts are written by well-recognized authorities on the law. For example, *Wigmore on Evidence* or *Perkins on Criminal Law* are two standard texts that supply information similar to that contained in the legal encyclopedias.

Primary Data

Two different concepts are involved in researching primary data on the United States justice system. The first category of such information includes the search for appropriate reports of legal cases. Most states have established procedures for publication of an official edition of all state appellate decisions. In addition, West Publishing Company has developed a National Reporter System which divides states into seven regions and prints appeal court decisions. United States Supreme Court decisions are officially reported in the *United States Reporter* while West covers those cases in the *Supreme Court Reporter*, and federal Court of Appeals decisions are recorded in the *Federal Reporter*. If the debater desires to find cases that deal with certain legal issues, use of one or more legal digests is recommended. A second category of primary information on the justice system consists of statistical data found in sources such as *Statistical Abstracts, Information Please Almanac*, and *The Sourcebook of Criminal Justice Statistics*.

Evidence Transcription

The final result of this research effort is the gathering of usable evidence to support arguments on issues raised during a debate. This evidence should meet commonly agreed upon standards for debate evidence. Among those tests of evidence mentioned by argumentation textbooks authors are: (1) expertise of the author, (2) unbiased reporting of information, (3) timely information, and (4) verifiable sources of data.

In addition, full source citation should be available for each unit of evidence used in a debate. Coaches involved with both high school and college debate are increasingly concerned about the challenges to information used during debate rounds. Contestants are responsible for knowing and following the rules and regulations required by their leagues, state associations, and the National Forensic League on source citations and challenges to evidence.

Some debaters carry copies of important affirmative and negative sources to answer immediately requests for clarification. A caution sounded in a prior *ERIC First Analysis* deserves repeating: "Particular problems often arise when evidence is paraphrased or when seemingly irrelevant information is edited out. As a general practice, this type of editing should be avoided."[5]

An example of a file card which contains a full citation is provided in Figure 1.

Figure 1

(1) D9

(2) Polygraph Accuracy

(3) Rex Julian Beaber; (4) Assistant Professor of Medicine, UCLA; (5) *Sacramento Bee*; (6) February 23, 1983 (7) p. B9

(8) The polygraph industry claims an impressive but exaggerated accuracy rate of about 90 percent. Even accepting this figure poses a real dilemma. If juries accept polygraph results, they must erroneously let free 10 percent of all guilty suspects. If they ignore the results, the time and money spent putting on the evidence was wasted.

(9) DR 27

Figure 1. The numbers prefacing various parts of the sample card refer to the following: (1) code number of section for refiling, (2) brief synopsis of the content of the evidence, (3) author of quotation, (4) author's qualifications, (5) source, (6) date of publication, (7) page, (8) one central concept of evidence, (9) initials of student researcher and consecutive number of total evidence cards researched by this debater.

The research process outlined here must continue throughout the year. Any topic will undergo substantial changes as the school year progresses. This topic, however, has greater potential than most for dramatic shifts as court decisions are made and judicial reform is debated in state legislatures and in Congress.

Professor Henderson's warning on a prior high school topic is still a valid observation:

> Those of you beginning to debate the new topic will want to broaden your reading, consider the implications of this first analysis, and discuss the potential implications with others. A debater should never rely on a narrow base of information, whether it be a compilation of viewpoints similar to *First Analysis*, a single news source such as a news magazine, a debate quote handbook, or the coach of a debate squad. Instead, the debater must broaden her or his understanding of the political context within which the subject is being debated, and then exhibit that understanding to the reasonable, prudent, thinking individual who serves as judge for the debate.[6]

Good luck during the coming year. If the following chapters establish the framework for formulating a systematic consideration of this topic, their purpose has been accomplished.

2. The Problem Area: The United States Justice System

What changes are most needed in the procedures used in the United States justice system?

Overview

When the public and politicians discuss reform of the United States justice system, the changes most often contemplated center on law enforcement in the criminal court system. Robert Raven, former president of the California State Bar, notes

> Although the criminal justice system includes the law enforcement group (police and prosecutors) at the intake end of the system, with the correction system (jails, prisons, probation and parole) at the final stage and the court system sandwiched in the middle, the media and, consequently, politicians are concentrating most of their attention, criticism, and reform efforts on the courts.[1]

The debate resolution that focuses on changes in the procedures of our nation's criminal courts was the top votegetter in the January poll of state forensic organizations. The two other resolutions, dealing with reform of law enforcement procedures and modifications to the procedures of civil courts, received fewer votes.

All three topics are interrelated; changes in one area affect the other two. For example, improvements in police investigation procedures which lead to more arrests would increase the demand for prosecutors and public defenders, exacerbate jail overcrowding, increase the backlog in the criminal courts, and add to a prison population that already exceeds current prison capacities. Yet another illustration is supplied by the effects of streamlining procedures or adding more judges in criminal courts. Since most courts handle both civil and criminal cases, procedural changes in one area would speed up disposition of cases in the other area. The impact on New York City of greater efficiency in handling cases is supplied by West Virginia's Supreme Court of Appeals judge, Richard Neely:

> a New York trial-court judge is empowered to hear both criminal and civil cases; if the number of judges is increased, more civil cases can be heard. . . .

> The potential liability for New York City from the civil suits currently awaiting trial runs to billions of dollars. New York City cannot afford an efficient court system, because it would be bankrupt beyond bail-out if all these suits came to trial in one or two years.[2]

The root of the public's concern with the justice system includes the feeling that criminals are protected at the expense of law-abiding citizens. The operations of the justice system are seen by many as needing reform since justice is not served when people manipulate both criminal and civil procedures to continue criminal activities.

Crime Statistics

Chief Justice Warren Burger in his 1981 report to the American Bar Association provided an overview on the prevalence of crime in the United States:

> From New York City, to Los Angeles, to Miami the story on increase in violent crime from 1979 to 1980 is much the same. New York City, with about the same population as Sweden, has twenty times as many homicides. The United States has 100 times the rate of burglary of Japan. Overall, violent crime in the U.S. sharply increased from 1979 to 1980, continuing a double-digit rate. More than one-quarter of all the households in this country are victimized by some kind of criminal activity at least once each year.[3]

FBI Uniform Crime Reports (UCR) measure the rate of crime reported to police. According to these reports, overall crime rose by 9 percent in 1980 while violent crime increased 11 percent. "In 1971 there were 346 reported violent crimes per 100,000 people. By 1980 the rate was 581 violent crimes per 100,000 people."[4] Only a small percentage of all crime is even reported to the authorities. Robert Raven notes that, "Accepted statistics reveal that for every 100 crimes only thirty are reported to the police who, on the average, arrest only six persons."[5] Thus, the UCR underestimates crime in America. On a personal level, each crime leaves in its shadow suffering victims. Business losses from crime are conservatively estimated at $30 billion a year, while administering the criminal justice system costs over $25 billion annually.[6]

Public Reaction

Public response to such a high incidence of victimization has been a combination of fear and anger. A February 1983 Gallup Poll based on scientifically selected interviews with 1,555 adults indicates that fear of crime is rampant. Almost half of U.S. citizens are afraid to walk alone at night in their own neighborhoods while 37 percent think there is more crime in their area than last year. "The current level of fear, as determined by the 1983 annual Gallup survey of crime, is up sharply from the 1960s (for example, 31 percent in 1967 were afraid of venturing out at night), but is no higher than the level recorded during the last decade."[7]

Coupled with this fear is a rising tide of anger at the inability of the present system to protect effectively its citizens. The resulting "law and order" movement seeks to increase the number of police, restrict the rights of accused criminals, reduce the discretion of judges, and increase prison sentences. Yet, this concern for safety needs to be balanced with protection of rights. David Brink, past president of the American Bar Association, explains

> Safety of individuals from crimes by other individuals satisfied our demand for order. That is a crying need of our time. But there is another kind of safety that may be even more fundamental—safety of individuals against wrongful convictions, police action, and government itself.[8]

Nor will allocating more resources to one segment of the justice system necessarily produce the desired results of greater safety for citizens. Judge Robert Kinsey notes the frantic pouring of dollars into police agencies at all levels of government:

> This reasoning dictates that if the crime rate escalates, hire more police to detect and arrest more offenders, but give no thought to whether already overcrowded jails can accommodate the increased populations; whether the courts can process the increased caseloads; whether prosecutors and public defenders, probation and parole agencies can physically—not to mention adequately—handle more cases; whether clerks' offices can deal with any more paperwork; whether the Department of Correction has any more cells to handle more prisoners serving longer sentences.[9]

Resources

The entire justice system is already overloaded. For example, California has spent two years toughening its penalties for crime, yet now state lawmakers may be reluctant to increase penalties for felons because of severe overcrowding in state prisons. As State Senator Robert Presley explained: "We have to hold the line on increased penalty bills that will exacerbate the problems of overcrowding prisons. And overcrowding is just going to get worse."[10] This problem seems to permeate the entire system as Judge Neely of West Virginia concludes

> in courtrooms, most accused criminals go free because the system cannot afford to have it any other way. Everyone involved in the criminal courts is overtaxed, from the policemen, who must take time off the beat to testify, to the prosecutors, who need to dispose of cases as quickly as possible, to the judges, who know as they make their sentencing decisions that the prisons are already overcrowded.[11]

The criminal court system is not the only part of the legal system in jeopardy. Legal scholar B. E. Witkin finds delay and congestion throughout the justice system:

> The system has grown far too cumbersome, and the laws and procedures are far too complex. The methods of getting justice are delayed too long. The glut of criminal cases, which are tried interminably and in an exhi-

> bitionist manner, crowds out the litigation and handling of affairs of law-abiding citizens. The cost of legal services is far beyond the reach of an ordinary person and no funding has been provided for representation and counseling of millions of people who need it. At the same time we are producing lawyers who cannot get employment.[12]

Not only do most of these issues receive little attention in state legislatures, but most states do not have the fiscal revenues for costly projects. A recent United Press International study indicates that twenty-four states have budget deficits. The National Conference of State Legislatures said that in 1983 anticipated revenues are down by almost $8 billion in forty-one states. Over two-thirds of the states have made budget cuts, twenty-eight have laid off state employees, and twenty-one have a hiring freeze.[13]

Against this background of fiscal difficulty, constitutional rights, and citizen pressure, the current issues confronting the United States justice system are highlighted. Before these areas are examined in later chapters, additional information is needed on the workings of the justice system.

Discretion

The United States justice system extends over all three branches of government and is composed of law enforcement agencies, the courts, and corrections. One of the major elements of this system is the discretion exercised at each level. For example, police do not investigate all crimes with equal vigor nor are all lawbreakers arrested. A large amount of discretion is given the prosecutor in determining which suspects are prosecuted, what crimes will be charged, and what sentence will be sought. Similarly, judges have latitude in certain trial procedures, instructions, sentencing decisions, appeals, and awards for damages.

Delay

Another major issue facing our law enforcement and judicial system is the problem of delay. As noted earlier, almost every part of this system is overworked and understaffed. This translates into slow response time by the police, delays in getting cases to court, overcrowded court calendars, and seemingly endless appeals of judgments on convictions. Former Attorney General Griffin Bell notes the consequences of delay:

> The deteriorating performance of the judicial system affects millions of Americans in very direct ways. Delays in trials or other resolutions of cases involving defendants freed on bail may result in their committing additional crimes. The same danger arises when there are delays in resolving appeals by convicted violators who are not yet behind bars. Business controversies serious enough to merit administrative or court attention may go unresolved for years because of the jammed dockets, with far-reaching economic consequences. A penniless plaintiff with a clearly meritorious claim may go unpaid—and suffer irreversible damage—because of backed-up trial and appellate courts. Citizens regularly lose the benefit of important legal rights because there is no practical means of securing those rights.[14]

Access Barriers

Yet another problem facing the justice system is the lack of access to the services offered by the courts. A 1977 report of the Second Conference on the Judiciary sponsored by the National Center for State Courts identified six commonly cited barriers to effective access:

- *economic barriers*: costs associated with retaining an attorney, court fees, and investigation data prevent low-income or fixed-income people from using the courts.
- *knowledge barrier*: the public is generally ignorant of the law and the operation of legal institutions.
- *language barrier*: most non-English speaking litigators are deterred from using the legal system.
- *geographic barrier*: courts are located away from rural populations; witnesses may have moved out of the court's jurisdiction; many courts are physically remote from the people served.
- *psychological barrier*: minorities or those with little education may fear involvement with the legal system. Others may be alienated from a system of "white" justice.
- *procedural barrier*: the courts have constructed barriers to litigant's claims such as filing dates or class action requirements.[15]

The result of these barriers is the denial of meaningful participation in the mechanisms for resolving most disputes.

The Justice System

The major parts of this system of American justice as outlined in the three debate resolutions are: law enforcement agencies and the courts. Both the federal government and state and local governments are involved in each of these areas.

Law Enforcement

While law enforcement investigative procedures are examined in chapter three, an overview of such agencies will provide the perspective on why law enforcement is an essential part of the justice system. Local governments not only have police or sheriff departments, but also a variety of semiautonomous enforcement personnel involved with security for mass transit, housing projects, ports, parks, and schools. In addition, these governmental jurisdictions may employ investigators to find welfare violators, building, fire, or other health and safety violations. State governments have both highway patrol and state police as well as various law enforcement departments attached to regulatory agencies. This pattern is repeated at the federal level with agencies like the FBI or Secret Service performing security functions while the Internal Revenue Service, the Environmental Protection Agency, the Occupational Safety and Health Administration, the Department of Justice, and numerous other agencies have personnel engaged in investigation of potentially criminal activity. Julian Greenspan, Deputy Chief for Litigation in the Department of

Justice notes the extent of regulatory involvement in the criminal enforcement area: "Virtually every federal agency administers regulations or statutes that have both civil and criminal penalties."[16]

Another aspect of law enforcement that lies outside the scope of public control is the growing number of private security and investigative forces. James Damos, president of the International Association of Police Chiefs, details the growth of such services:

> In the past decade, the private security community has made significant advances in its service delivery. Private police now outnumber public police two to one, and their quality of service has increased appropriately. As greater urbanization and pursuit of the job market continues to concentrate large numbers of people in high rise residential complexes of the inner city and its surroundings, there quickly follows the support services of shopping centers, mass transit systems, entertainment industries, schools, and hospitals.[17]

These security personnel are often armed and, increasingly, they are using their weapons. Allegations are frequently made that many of these "rent-a-cops" are poorly trained or unsuited for work in law enforcement. Two-thirds of the states have regulatory agencies for security services, but their effectiveness is in doubt.[18] Tighter control is needed to protect the public from unwarranted intrusion by such paid guards. In addition to problems arising from arrest, search, and detainment by such personnel, private enterprise has also stepped in to gather intelligence about the activities of citizens. *Police Magazine* notes the problem:

> Public police agencies, strapped by public criticism and legal curbs on their intelligence operations, have been receiving information in the past few years from a growing array of private surveillance operations that specialize in collecting information about political movements.
>
> Some civil libertarians see this as a dangerous trend, since private intelligence operations are not subject to state, local, or federal guidelines, nor are they subject to freedom of information acts or other disclosure laws that would allow them to be monitored. In addition, it is more difficult to sue them than public agencies for violating privacy and free expression rights.[19]

Judge David Schepps argues that while citizens have some ability to check the abuses of public law enforcement agencies, the citizenry "must create new mechanisms of control over private agencies."[20]

The Court System

The United States court system exists at both the federal and the state levels of government. Each state has its own judicial system composed of a variety of trial courts which usually hear both civil and criminal cases, and at least one level of appeals courts before reaching the highest court, which is usually the State Supreme Court. Figure 2 demonstrates the California court structure, typical of many large states.

CALIFORNIA COURT SYSTEM

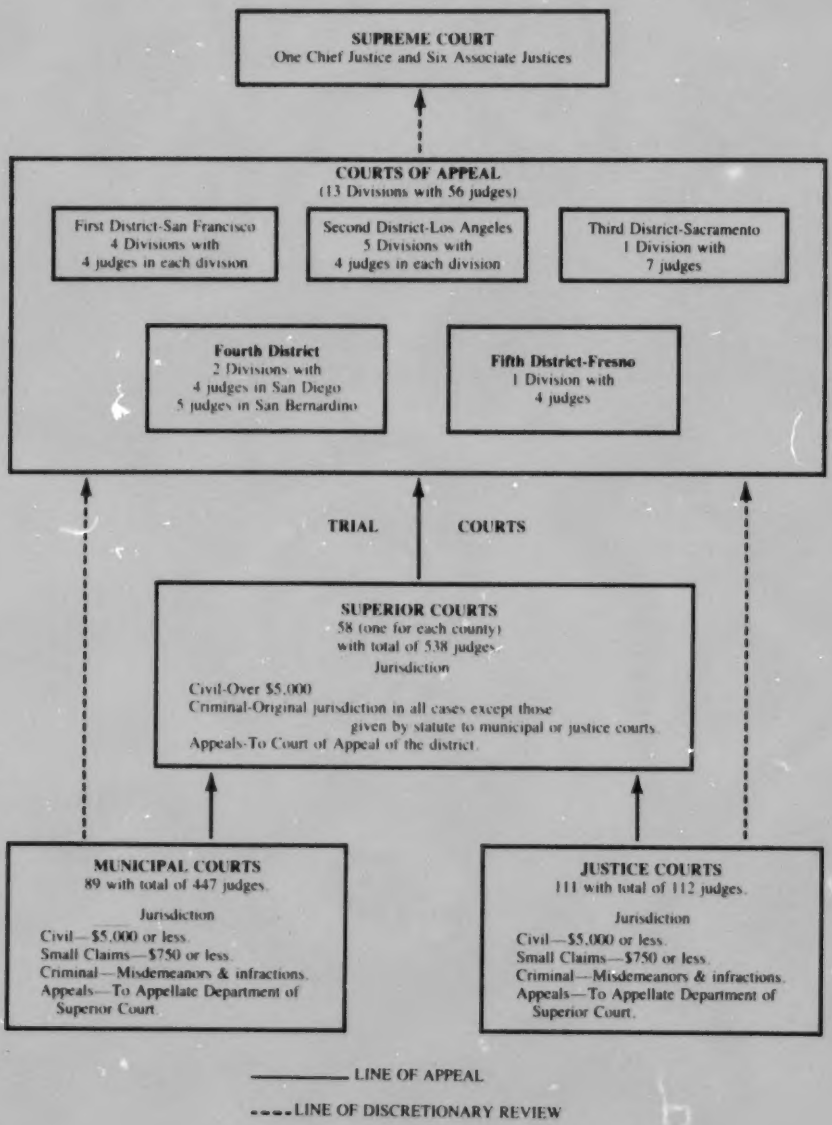

Figure 2. From: Mack, *California Paralegal's Handbook*, 1977.

At the federal level, the civil and criminal trial courts are called U.S. District Courts. The losing party in most District proceedings has a right to appeal to the Circuit Courts of Appeal as do the losers in many regulatory agencies' decisions. The highest court is the United States Supreme Court whose decisions are binding on all lower state or federal courts. Cases reach the Supreme Court either by appeal or by a writ of *certiorari*.

With two distinct court systems, the question of which court has jurisdiction to hear a case becomes important. Some rights arising under state law may be tried in federal court, while some federal issues may be heard in state court. In addition, some cases may be heard in either court, a situation known as concurrent jurisdiction. While the rules of jurisdiction are too complicated to examine in detail, a few general guidelines will be discussed.

"The state courts are courts of 'residual' jurisdiction—they have authority over all legal matters that are not specifically placed under federal control."[21] Certain areas are basically federal issues. Subject matter jurisdiction refers to those legal issues specifically placed in federal hands by the Constitution or Congress. Copyright law, bankruptcy, and issues arising from interstate commerce are examples of subject matter jurisdiction. State laws or court decisions that are deemed to violate the U.S. Constitution are properly federal questions. Yet a third source of federal jurisdiction is diversity of citizenship—a situation in which two citizens from different states sue each other.[22]

Other Courts

In addition to the regular trial and appellate courts, some special tribunals require brief mention. A great deal of dispute adjudication occurs before administrative law judges. Over one thousand federal administrative law judges and two or three thousand state administrative law judges are attached to executive departments and regulatory commissions. Referred to as hearing officers, referees, judges, or hearing commissioners, these individuals hear claims for benefits or for enforcement of existing laws.[23] Over thirty federal agencies such as the Internal Revenue Service, the Social Security Administration, the Labor Department, and the Immigration and Naturalization Bureau, make extensive use of these agency judges who last year decided over 250,000 cases. State unemployment or welfare agencies make extensive use of such judges to speed up claims for benefits. In most instances, provision is made for appeals to the appropriate court if claims are not satisfactorily settled.

Another special court is represented by the military justice system. The initial court-martial tribunal is essentially controlled by the commander, and the defendant is tried under military law. Different procedural protections are provided in such proceedings, and review of appeals is placed in the Court of Military Appeals.

A final special judicial system has been established by Indian tribes. Tribal courts have jurisdiction over certain crimes committed on reservations. While this would seem to be an effective expression of Indian self-government,

Professor Brakel, in his study of such courts for the American Bar Foundation, concluded

> The tribal courts do not work well, and necessary improvements would require much time and involve many difficulties. To perpetuate them at all runs counter to the evolutionary trends in the Indians' relation to the dominant culture in this country. Therefore, it would be more realistic to abandon the system altogether and to deal with civil and criminal problems in the regular county and state court systems.[24]

Definitional Considerations

The final portion of this overview of the general problem area of the U.S. justice system will discuss the importance of defining or clarifying the major terms of the debate resolutions. Several reasons give importance to defining the major terms. Underlying all reasons is the essential requirement to separate permissible areas for affirmative and negative inquiry. Definitions focus the debater's attention on those areas important to research. They add substance to the various options available to the negative. Good opportunities for negative counterplanning or topicality argumentation often can result from analysis by definition. As noted in a recent textbook on argumentation, definitions, in addition to contributing to general clarity, also help uncover the major issues in dispute.[25] Thus, at the beginning of any debate season, a comprehensive knowledge of the various definitions pertinent to the problem area is essential for identifying potential affirmative cases, as well as for preparing effective negative cases.

Types of Definitions

Various methods may be used to define essential terms. One way is to formally announce the meaning of each word in the resolution near the beginning of the first affirmative speech. Another approach, more commonly employed, is to define the resolution operationally as the affirmative plan. It is assumed that this concrete plan will embody the true meaning of the essential words of the debate topic. In other words, to define the resolution operationally assumes the plan does reflect the resolution. Specific definitions and arguments that justify this particular affirmative interpretation should be kept in reserve to be used if the negative issues a topicality challenge. The following information was discussed in an earlier *First Analysis*.[26]

The burden of supplying a reasonable definition of terms rests with the affirmative. Too often this obligation is misconstrued as being met by offering any definition. Actually, it is very important to establish a standard to measure how reasonable or rational the proffered definition really is. This standard should ultimately determine the victor in a clash of differing approaches to the resolution.

One approach is to offer an intuitive idea of what a reasonable person would consider proper areas for consideration under the debate topic. Sometimes this position is advocated without evidence, and typically, references are made

to what the common citizen would consider topical. This approach, if taken without using evidence, places the debater at the mercy of the other team or the judge; they do not need to supply much refutation to weaken seriously the impact of this type of definition. A standard dictionary definition, which offers a general consensus of meaning for words, can provide added authority for the position.

Another approach tries to discover the spirit of the resolution or the interest of the NUCEA Committee on Discussion and Debate. Certainly the provision of a problem area and the publication of *The Forensic Quarterly* makes this an easier task than in college debate where a parameter statement is the only additional information conveyed by the authors of the resolution. However useful the available information may be early in the summer, most debaters by the end of the season will research the topic more extensively than the preliminary investigators for the discussion committee. The pool of knowledge relied upon to formulate the resolution is quickly exhausted—and then exceeded—by the industrious researcher. Thus, topicality should not be regarded as a static issue, forever occupying fixed, immutable boundaries. As additional and more thorough sources are explored, ideas of what fits within the topic should also change.

Yet a third approach requires examining the grammatical context of the words and phrases in each resolution. The position of adjectives, dependent or independent clauses, and prepositions may provide an indication of the meaning of important terms.

A final method for discovering meaning is to examine what experts in various fields consider to be relevant information on certain topics. For example, procedure is a very specific term to a lawyer. Legal, economic, and business dictionaries each offer an exact definition of this term. A number of very good legal dictionaries can be consulted. Among the three most widely used are *Black's Law Dictionary*, *Words and Phrases*, and *Ballentine's Self-Pronouncing Law Dictionary*. Similarly, textbooks, laws, and congressional committees that deal with justice, law enforcement, and the courts consider a variety of issues which are easily researched. Concepts are clarified by policymakers when they use them in conjunction with certain topics. This field approach also encourages the debater to consider different approaches to problems:

> Thus, a special value of disputation about a proposition's meaning or about any of its terms is that it forces debaters to carefully consider the differences in interpretation which appear across fields. One confronts the nature of fields, as it were, face to face when one grapples with differences in the interpretations of specific terms. No better way of illustrating the differences between communities of discourse immediately suggests itself.[27]

The beginning of each of the following chapters will discuss the definition of the basic terms of each resolution.

3. Criminal Investigations

Resolved: That the United States should adopt uniform rules governing the criminal investigation procedure of all public law enforcement agencies in the nation.

The investigation of crime is a necessary component of the criminal justice system. Through proper investigation, information on crime and criminal activity can be provided to the courts so that the interests of justice can be served. Providing uniform rules may alleviate some of the shortcomings of the present system and improve results obtained from such investigations.

Basic Concepts

This resolution calls for adopting uniform procedures. John Alderson notes those methods of investigation currently controlled through social norms:

> The police face some of the most intricate and difficult problems in the investigation of crime. In all civilized systems there are rules which forbid the use of dehumanizing practices such as so-called truth drugs, torture, psychological disorientation, deprivation and so on. In extreme cases there are considerable pressures on the police to exact confessions and to extract information at almost any cost, but it has to be accepted that the end can never justify the means where the means in themselves are illegal. Of course, the police have to seek the appropriate powers to discharge their task but, at the end of the day, they have to perform their duties under the conditions as they exist, not as they would like them to exist.[1]

Any other change in the procedures used by investigative agencies will have distinct advantages and disadvantages. This chapter will examine some of those possible reforms.

A law enforcement agency is, in the broadest sense, any group involved in the investigation of criminal conduct. More specifically, law enforcement is restricted to

> . . . the field of crime prevention, enforcement of the criminal laws by investigation and apprehension of the offenders, and preserving the peace; persons and/or agencies involved in law enforcement activities. Some include prosecuting officials, criminal courts and corrections in the field of law enforcement.[2]

Indeed, law enforcement agencies often are defined to include the courts. *Words and Phrases*, a respected legal dictionary, notes the following:

> Term "law enforcement agency," in Criminal Injuries Compensation Act, was intended to include police, prosecutors and arguably the courts and even grand jury, but not the Criminal Injuries Compensation Board as agency empowered to administer the act.[3]

Prison officials involved in the investigation of specific crimes are also identified as law enforcement agencies as are Alcohol Beverage Control agencies.[4] States also have many regulatory agencies involved in the investigation of criminal activity.

This resolution implies the modification of public law enforcement. This term is conceptualized by Arthur Bileck as follows:

> Various professionals in the field consider the key distinction between public and private security to be whether or not personnel have police powers, i.e., the power of arrest. In many instances, publicly funded personnel possessing full police powers operate independently of public law enforcement agencies and perform security functions in limited areas, such as mass transportation, public housing, park districts, school districts, some colleges and universities, railroad police, port authorities, and toll roads. Many of these personnel use the title "police" and have statutory power of arrest independent of any local, state, or other law enforcement agencies. These individuals are clearly not sworn law enforcement officers of city, county, state, or federal law enforcement agencies.[5]

All the debate resolutions call for uniform rules. Uniform means: "conforming to one rule or mode."[6] In this respect a call for change need do only certain things: require all agencies to operate under one rule or set of rules; require agencies to follow certain procedures (such as investigate crime in a certain manner); or require agencies involved in certain aspects of crime to use certain specified rules. In other words, to be uniform does not mean all jurisdictions need follow the same rules, only that the rules that are adopted must be followed consistently. For instance, a uniform rule may state that all cities with a defined large population create special units to fight certain crimes. As long as all cities that meet this criterion do so, it is a uniform rule.

A word of caution for the researcher. Many cases in this area overlap with criminal court procedures and it would behoove the prudent researcher of either topic to consider the evidence and issues raised in the other. With so many agencies potentially involved in criminal investigations, this chapter will focus on just a few of the concerns directly related to more traditional interpretations of law enforcement agencies. After considering some general issues, the following topics will be explored: the Federal Bureau of Investigation, surveillance, stings, aerial surveillance, search techniques, interrogation, arson, crisis intervention, rape, drunk driving, deadly force, and crime against the elderly.

General Concerns

Society determines the level of crime that it will tolerate. Not only are the many crimes defined by society but the nature and extent of enforcement are

also decided by the level of popular support. Prevention of crime should be a major focus of our criminal justice system. John Alderson, a noted international authority on criminal justice, comments

> To neglect the prevention of crime is, in a way, to deny human rights for the victim and, to the same extent, for the offender inasmuch as society has a duty to save offenders from their own criminality. A society which neglects victims of crime can be said to be condoning crime.[7]

Alderson also provides three levels of crime prevention. The primary level is the existence of social conditions that discourage or dispel criminal tendencies, especially for young people. The second level of crime prevention is law enforcement patrols in public areas. The last level is the prospect of increased conviction for crimes which are committed.

Emphasizing prevention of crime involves a drastic rethinking of current priorities. However, changes in the political structure are required before such a shift can occur. As Alderson explains

> Police systems are the products of historical diversity. Differing cultural, social, and legal traditions not only produce different police concepts, but also public attitudes toward police and their functions. Not only will the attitudes of the public vary, but the police will have differing views of their place in society and of what is regarded as their proper function.[8]

These diverse political pressures tend to promote unequal levels of law enforcement which, in fact, are exactly what the people want. It can be argued that any given level of enforcement is the result of citizen pressure. Richard Neely, a West Virginia Appeals Court Judge, states

> Why, then, have we not taken steps we know would have some effect? The answers are complicated, but chief among them is that for every proposal that might be made to reduce crime, there is a powerful, organized interest that opposes it. These obstructive groups often include the most influential force of all, the middle-class interests that so frequently complain about the threat of crime.[9]

Such a system reflects the views of more powerful constituencies, not necessarily those who are most likely victims of crime. The currently popular concern for victims of crime often ignores the most likely victims—the poor and others living in ghettos or declining neighborhoods.[10] With powerful groups opposing crime reform, it is clear that few changes will be made in the current system that would truly reflect the needs of our less-advantaged citizens.

In addition, the public is concerned with the effectiveness of its law enforcement personnel. In their role as crime investigators, the police examine evidence for crimes already committed. The structure of most Police Departments places detectives, not uniformed officers, in charge of such investigations. The Rand Corporation studied this use of specialists in 1973. The results were summarized by professors Vergil Williams and Raymond Sumrall:

> The Rand Corporation published its findings in October 1975. Its conclusions and findings sent tremors throughout the world of police management. Contrary to *a priori* asumptions cherished since Sir Robert Peel's Metropolitan Police act of 1829, there was no *a posterior* evidence that detectives played significant roles in solving crimes, despite the popular stereotype of the detective promoted by novels, movies, and television programs. Rather, most cases that were solved at all were solved through the preliminary investigations of patrol officers, through information provided to patrol officers by ordinary citizens, or through the most basic routine police procedures (e.g., the identification of a felon or possible felony through routine traffic check). In short, very few crimes are solved by the skills usually attributed to detectives.[11]

Hence, one of the most effective crime prevention techniques may be the increased use of patrol officers. Currently, there are nearly one-half million police officers. Expansion of police forces has not been seriously considered by most cities; indeed the nation seems to be in a period of fiscal retrenchment which would preclude such a policy.[12]

Another concern centers on allegations of police mistreatment of suspects. Police in the performance of their duties are often legally liable for their activities. Professor Rolando del Carmen noted

> A recent report of police tort cases published by the Americans for Effective Law Enforcement, Inc., (AELE) and conducted by the International Association of Chiefs of Police states that 13,000 suits were filed against police officers between 1967 and 1971. According to the report, there was a 124 percent increase in the number of civil suits filed against police officers from 1967 to 1971. False arrest, false imprisonment, and malicious prosecution constituted over 40 percent of the suits filed in the five year period studied. The average judgment during the report period was $3,024, although some judgments were six figure awards. By 1975, the number of suits alleging police misconduct exceeded 6,000 according to the AELE report. The study estimated that an average of 111 hours are used in defending and 97 hours used in investigating a typical police misconduct suit.[13]

The U.S. Supreme Court recently granted absolute civil immunity for police who lie in court thus severely limiting the use of lawsuits to control police action. The court did not preclude criminal sanctions for such witnesses.[14] Negative teams may argue that increasing the use of civil law would replace the need for uniform standards to control police abuse. Affirmative teams could argue that uniform standards for victims of police abuse would eliminate some of the problems of police misconduct, allow consistent uniform recompense for the victims of such misconduct, and allow a forum for poor or minority victims to air their grievances.

Federal Bureau of Investigation

The Federal Bureau of Investigation (FBI) is our major federal criminal investigation agency. Allegations concerning FBI abuse of investigative powers in 1975 led the Pike and Church Committees in the House and Senate to hold

hearings on FBI conduct. Reports and other information given these committees detailed serious and numerous abuses symptomatic of an agency out of control. However, the quality of subsequent reform that resulted is questionable. Professor Tony Proveda of the State University of New York insists little real reform occurred:

> Although the post-Watergate political climate has exposed past abuses of the intelligence agencies, we should not confuse public disclosure with reform. There are recent indications that the disclosure of Hoover-era abuses, which initially provided the impetus to reform, has not been used to stem questionable practices: Rather than reinforcing prohibitions of those abuses, disclosure has served to promote the channeling of comparable work into different organizational arrangements.[15]

Superficially, things have changed at the Bureau: "as the GAO report indicates, FBI domestic intelligence operations have in fact been dramatically reduced since they peaked in 1972."[16] The reason for this change appears to be an emphasis on quality intelligence over quantity.[17]

Political squabbling has prevented the recharting of the FBI demanded by the great uproar in Congress. In lieu of a new charter, directives issued in the past few years by chiefs of the bureau have set agency procedures. Gary Hayes, executive director of the Police Executive Research Form, described the advantages of a new charter in place of the *ad hoc* approach of the *status quo*:

> A charter would define federal, state, and local cooperation. It would clarify whom the FBI works for, whom it is accountable to, and would set up a policymaking process. Without a charter, bureaucrats are left making the decisions, and that's not right in a democracy.[18]

Even with these advantages, the likelihood of the Reagan administration approving such a document is slim:

> The need for restrictive FBI guidelines was recognized by both the Ford and Carter administrations. And now, five years after they were implemented, they are not only accepted but endorsed by high FBI officials. Nevertheless, the Reagan administration has proposed to curtail or abolish them.[19]

Perhaps a well-defined charter could solve these and other problems.

The current mood indicates repeal of the restrictive regulations of the last few years. William Webster, Bureau chief, has issued guidelines eliminating those left by the Carter administration:

> In the absence of charter legislation, the Levi guidelines (effective April 1976) have provided the standard for opening domestic security cases. These guidelines do not restrict domestic intelligence investigations to violations of federal law; they accept the premise that the purpose of such investigations is prevention as well as prosecution. This premise, along with the ambiguity of the guidelines, in effect allows many of the same kinds of investigations that led to the abuses of the past.[20]

Old guidelines are now superseded by even less restrictive rules, perhaps opening up the door for the return of previous abuses. The new rules

> —Authorize the FBI to infiltrate or put informants into groups during preliminary inquiries, where "there is not yet a reasonable indication of criminal activities" warranting a full investigation. Levi had restricted these techniques to full investigations.
> —Permit the FBI to continue low-level monitoring by informants of groups which have become dormant and pose no "immediate threat of harm." The FBI had been closing investigations when a group had gone more than a year without resorting to violence.
> —Authorize for the first time full investigations into public advocacy of crimes of violence where there is apparent intent to carry out such threats.
> —Allow the FBI to collect publicly available information on groups or individuals who are not under investigation if the Privacy act is not violated.
> —Allow the FBI to investigate members of front or support groups that are knowingly aiding the criminal objectives of a violence prone group already under investigtion.[21]

These new rules were formulated specifically to protect the country from terrorist attacks.

Terrorists must be controlled. However, research does not bear out the perception that terrorism is a major problem in the United States. Statistics indicate

> The number of terrorist incidents in the United States gradually declined between 1977 and 1980. In 1977, the United States experienced 111 acknowledged terrorist incidents. In 1978, there were sixty-nine claimed incidents in the United States and its possessions. That figure was reduced to fifty-two in 1979, and twenty-nine in 1980. In 1981, however, the number of claimed incidents increased to forty-two.[22]

Numbers alone do not necessarily reflect the true nature of the problem. Because of the potentially destructive power of available weapons, concern still is generated that *any* terrorist attack could be disastrous:

> Sophisticated weaponry is widely available now, and it will not be much longer before, in the opinion of observers, chemical and biological weapons of mass destruction will be available to the international terrorist community. Although quite improbably, a few argue that terrorists will someday get their hands on nuclear explosives.[23]

The techniques needed to fight terrorism involve the full range of police powers. Charles Monroe, member of the FBI, argues

> No discussion of anti-terrorist investigative techniques is complete unless it touches on the more sensitive and intrusive techniques—court authorized electronic surveillance, informants, and undercover agents. The FBI's record in both criminal and foreign counterintelligence cases demonstrates that we use these tools effectively while balancing individual rights and the rights of citizens. We use, and will continue to use properly, these tools to counter the danger that the armed terrorist poses to our society.[24]

Mr. Monroe's optimism is not shared by all. In the next section, uses of surveillance techniques will be discussed on several levels.

Surveillance

Much of the work of federal, state, or local police involves surveillance of potential criminals and criminal activities. Under President Reagan the use of technological means of surveillance has increased. Along with preventing terrorism, the FBI also focuses on organized crime:

> Federal wiretapping, after years of decline, doubled during 1982, to reach its highest point in a decade. During the twelve-month period ending last September, federal judges issued 226 electronic surveillance warrants—more than twice the number for the previous year. Wiretaps on narcotics dealers alone skyrocketed by 300 percent, according to figures that the Drug Enforcement Administration has supplied . . .[25]

While local and state use of wiretaps has declined, the potential exists for increased use because of new state rules:

> On the state and local level, wiretapping has declined for the last six years, and probably went down again in 1982. However, seven states have passed their own electronic eavesdropping laws in the past four years, which permit state and local police to run their own eavesdropping operations. A total of twenty-eight states and the District of Columbia, have enacted such laws. In states without "taps laws," the yearly battles between police and legislators over eavesdropping have intensified, and several states seem to be on the verge of authorizing electronic eavesdropping for the first time.[26]

The advantages of investigation by wiretap are numerous. In many cases the evidence obtained through wiretapping has been the crucial component in major convictions:

> As the recent Teamsters case showed, the use of electronic surveillance under this law has provided powerful evidence of conspiracies that might not have come to light otherwise. It has brought to justice high level mobsters, helped to break up drug-smuggling operations and supplied law enforcement with a clearer picture of how organized crime works.[27]

Although the benefits of obtaining information may be great, the costs to individual liberty are also high.

Under Hoover, the FBI conducted surveillances of political and social personalities. State and local police also set up special units to gather similar information. In many cases such spying was done without warrant, and for noncriminal purposes:

> The paucity of real terrorism in this country has often allowed police intelligence units to let their attention wander from violent threats to the public safety to causes that are merely unpopular or disliked by those in power. The most universally acknowledged misuse of such units has been to spy on politicians' political opponents. Former or current mayors of Seattle, Detroit, and Houston have discovered, after they were elected, that their predecessors had used the cities' intelligence units to keep track of them. Former Mayor Richard Daley of Chicago had police report each week to him on the activities of his political "enemies."[28]

Allan Alder of the Center for National Security Studies, an American Civil Liberties Union (ACLU) supported project monitoring police intelligence

activities, reports: "The police can too easily stifle political dissent under the guise of 'national security.'"[29] Frank Donner, historian and civil rights lawyer, concurs stating

> The impact of surveillance on an individual's sense of freedom is enormous, and, for this reason, yields the greatest return of repression for the smallest investment in power. . . . Surveillance has tranformed itself from a means into an end: an ongoing attack on nonconformity.[30]

Clearly a case can be made to restrict the use of such techniques. However, given the advantages of its use, a case also can be made to expand such methods of law enforcement investigation under uniform procedures.

One approach often mentioned is a policy of restricting electronic surveillance to obvious criminal activity. Controls on the gathering of information may even enhance the quality of legitimate information gathered:

> Lt. Col. Justin Dintino, head of the Law Enforcement Intelligence Unit (LEIU), a 235-agency national intelligence-sharing network, said that most police intelligence units not only collect less information today, but also have shifted their emphasis from political concerns to traditional organized crime.[31]

The use of electronic means is not limited to nonparticipant investigations. With the advent of the electronic mechanisms, "sting" operations have taken an entirely different tack.

Sting Operations

In combination with audio technology, the videotape age has altered the methods police use to investigate crime. Sting operations have become commonplace:

> Recent Federal investigations, such as ABSCAM, MILAB, and BRILAB, and the many local variations, such as police-run fencing fronts and anticrime decoy squads, call attention to changes in an old police tactic: undercover work. In the last decade, covert law enforcement activity has expanded in scale and changed in form. At the local level, for example, the proportion of all police arrests involving undercover work has roughly doubled in the last fifteen years. This represents in part an increase in work countering drug offenses. But new federal aid for strike forces, the Witness Protection Program, fencing stings, and anticrime decoys has been a major stimulus.[32]

One of the major reasons for the expansion of this activity is the advantage such evidence presents in prosecution of crime. A person caught on tape making an illegal deal is more likely to be convicted. Also, with the increasing complexity of search and seizure rules, an accurate record exists of how an arrest was made. In the ABSCAM case, for example, an assistant attorney general viewed the tapes as they were being made, enabling a warning to be sent to agents to prevent legal problems.[33]

Striking examples of the success of sting operations include

> —Clifford's Las Vegas unit worked with federal undercover agents in 1976 and 1977 to establish a storefront fencing operation that caught 1,400 transactions on videotape. More than 300 indictments were brought and 175 defendants convicted, some on multiple charges. In the second year of the operation, $12 million worth of stolen property was recovered.
>
> —In Pima County, Ariz., Steve Cartwright, the county Sheriff's video production coordinator, says that twenty-six men recently were charged with frequenting prostitutes; after seeing themselves on videotape, only eight or nine took their cases to trial.
>
> —In Memphis, Tenn., a video surveillance unit has obtained a 98 percent conviction rate on about 4,000 indictments in the last seven years. The unit is headed by Lt. John Talley, nicknamed "The King of Sting." Talley's unit uses sophisticated tape recorders and color television cameras; it has recovered $15 million in stolen property.[34]

However, by shifting the criterion for success from the number of convictions to reduction of crime, others question this record of success:

> A 1979 Justice Department study, entitled *What Happened*, makes rather grandiose claims for the success of sixty-two anti-fencing sting operations carried out since 1974. But in a reanalysis, Klockars casts serious doubts on the quality of these data and their interpretation. Klockars concludes that there is no sound statistical evidence to suggest that the sting operations produced a decline in the rate of property crime. An analysis of the use of federal funds for anti-fencing projects in San Diego over a five-year period concluded that neither the market for stolen property nor the incidence of property crime had been reduced.[35]

However, the quantitative success or failure of sting operations is not the only question. Such operations also present problems for the police:

> Other costs to the police . . . can be wasted resources and even tragic consequences. The secrecy, presence of multiple enforcement agencies, and nature of many undercover activities can mean that police end up enforcing the law against one another. Sometimes the instances are merely comical, as in the case described by Whited. Here, an effeminate man wearing mascara went for a walk with another man he met at a gay bar. After a series of suggestive comments, the former, an undercover officer, sought to arrest his companion. He discovered that the companion, also an undercover officer, was hoping to arrest him. Other times, however, the results are far more serious, as undercover police are shot or killed by other police. In recent years in the New York area alone, eight black police officers in undercover roles or working as plainclothesmen have been shot (five fatally) by other policemen who mistook them for lawbreakers.[36]

The courts have generally held as constitutional the use of sting operations. Some commentators doubt the accuracy of that assessment. Besides possible violation of the Fifth Amendment protection against self-incrimination, there is also the Fourth Amendment requirement for warrants. In the case of sting operations, warrants are seldom used:

> Most video surveillance is conducted without warrants or court orders, however. This is because the courts have ruled that search warrants are not

> required in public places, or where the consent of the owner of the establishment is obtained, or where one of the parties to the surveillance consents.[37]

Nat Hentoff, member of the Board of Directors of the American Civil Liberties Union, considers such procedures a clear violation of the Fourth Amendment requiring that one search with "particularity." He warns

> If this nation should ever become an authoritarian state, it will not be through a coup. The change will have been under way, incrementally, for a long time, as the citizens in each generation become increasingly accustomed to the mere possibility of the ubiquitous government ear and eye.[38]

Through use of technological surveillance methods, the warning of Orwell's *1984* could indeed prove true.[39]

Other Search Techniques

Added to electronic searches are more traditional physical searches of the individual and personal immediate surroundings. Edwin W. Tucker explains the logic of search law:

> In the area of the criminal law, the Fourth and Fifth Amendments serve as the critical guardians of one's "right to be let alone." The Fourth Amendment prohibits *un*reasonable warrantless searches or seizures but not reasonable ones. The Supreme Court has observed that this Amendment protects "persons" rather than "places." As presently interpreted, it shields one from an unreasonable governmental intrusion in any setting in which it would be reasonable for a person to conclude that what he or she is saying or doing is being done in private, beyond the inquiring eyes or prying ears of government officers.[40]

Two types of search techniques deserve special attention. The first is the search and seizure of automobiles; the second deals with the use of strip searches.

The courts over the years have created several special rules concerning the search of automobiles. Many argue the inherent mobility of vehicles makes use of warrants often impossible. Others, including Professor Barry Latzer, believe the justification for these warrantless searches is weak:

> In sum, neither of the proffered justifications for warrantless search and seizure of automobile is persuasive. The concept of mobility has been disfigured beyond recognition, and the expectation of privacy seems something of a transparent rationalization. The result is that security against automobile searches has been largely eviscerated.[41]

This exception to Fourth Amendment requirements for warrants may allow for an increased identification of possible felons, but the trade off—protection to citizens versus loss of individual civil liberties—is suspect. A case can be made to remove this exception, especially in the case of "tow and search." In such instances a car is brought back to the police station before a search is conducted. In this instance, time to obtain a search warrant is available, mitigating the justification for the existence of this exception.[42]

Strip searches do not require warrants in many cases since they are used mainly against people arrested and taken into custody. The FBI, Drug Enforcement Agency, and many local agencies often use strip searches as routine procedure.[43] However, in many instances, apparently unjustified searches are conducted. Women have complained that after routine traffic tickets they have been brought downtown and forced to undergo strip searches.[44] Unless limited, police generally assume the right to incorporate strip searches into routine booking procedure.[45] The result can be extremely damaging to the psychological well-being of the women. Some women equate the procedure to rape: "In psychological testimony, women say the aftereffects were similar to rape—they hesitated to participate in normal sexual relations afterwards. It's a degradation and affects people in sexual terms."[46] Given the vastly differing rules, either a uniform ban or a uniform rule regarding the use of strip searches appears necessary.

Aerial Surveillance

One last area of surveillance to be considered is that performed by helicopters and airplanes. Easy access to air transportation encourages police to use this technique to increase surveillance capabilities. The courts have allowed such searches, although the rationale behind these procedures is questionable. Ronald Granberg commented

> The recent decisions depart from the proper standard; namely, whether by his own particular acts the defendant has objectively manifested a reasonable expectation of privacy. The recent decisions also overlook the fact that aerial surveillance is not "plain view" because, absent feathered policemen, such surveillance cannot occur without technological assistance. An aerial view is no more "plain" than a wiretap is "plain" hearing.[47]

When an aerial team hits the sky they usually patrol a large area. This allows for uncontrolled searches in areas previously considered private by most landowners. Such aerial searches help to discover plots of marijuana being grown in the middle of other crops.

Interrogation

In 1966 a Warren Court decision required a warning from police before any questioning can occur after an arrest. These warnings arose from the case of *Miranda v. Arizona*, and are known as the Miranda rights. Until this time, courts and lawmakers remained silent when confronted with evidence of abuse of questioning procedures. Although the decision created a uniform procedure, its application has varied so much that William Hart argues, "Law enforcement executives and interrogators are pleased that they have so effectively muted the impact of the Miranda decision."[48] University of Michigan Law Professor Yale Kamisar complains

> Miranda wasn't really all that devastating. I don't deny that policemen give the warnings, but they can give it in the same tone of voice as asking,

> "How tall are you?" They can make it seem like part of filling out just another form. The suspect doesn't really absorb it. If I were giving the warnings, for example, I bet the number of suspects would go up phenomenally.[49]

If clear and uniform interrogation rules are created, much of the confusion regarding confessions may be eliminated. The assumption of this position is that more effective investigation would lead directly into more effective prosecution. Debaters may wish to suggest such procedural regulations as one approach to this resolution.

The focus in this chapter now shifts from these broader issues to examples of specific crimes that would benefit from reformed procedures.

Arson

The crime of arson affects everyone either directly or indirectly through raised fire insurance premiums. One of the problems in investigating arson is the lack of a coherent definition of what constitutes arson. Elaine Knapp isolated some of the reasons for this confusion:

> Finding out how many arsons occur in the U.S. is a problem. Arson statistics were first collected in 1979 by the federal Uniform Crime Reporting program after arson was designated a Part I offense by Congress in 1978. The federal statistics include only fires determined through investigation to have been willfully set and exclude unknown origin or suspicious fires. Since arson investigation is lacking in many parts of the country, these official figures for arson are lower than many kept by other sources.[50]

The most recent official figures show grim totals:

> With reports from law enforcement agencies representing 84 percent of the U.S. population, the number of arsons reported was 128,752 during 1980. More than half were against structures, with 58 percent of those against residences. Property damage by arson totaled $891 million, with average losses of $7,745. There were 291 murders by arson.[51]

However, as stated, these official figures may reflect an underestimating of the problem. The National Fire Protection Association, an industry organization, "estimated that incendiary and suspicious fires during 1980 totaled 146,000 out of 3 million fires, that 770 persons were killed by arson out of 6,505 fire deaths, and that arson cost $1.76 billion out of a total fire loss of some $6 billion."[52] Indeed, a uniform national reporting system for reliable arson data seems a necessity.

Other changes could help stem this destructive crime. Past reforms have included cooperation between insurers to identify possible arson suspects. Many buildings set afire are overinsured, others owe back taxes. To help prevent arson, some states have passed laws forcing insurance claimants to prove real value of property (Kansas) and with claims over $10,000, to prove no taxes are in arrears (eight states). Nine states provide for delays in the settling of claims for suspicious fires to allow for arson investigation.[53] How-

ever, such efforts are limited. Broader legislation granting immunity from lawsuits to insurance companies and encouraging reporting of arson suspects has been passed in forty-eight states. Twenty-nine states allow for the reciprocal flow of information between law enforcement and insurers.[54]

Some insurance companies have encouraged the investigation of arson by providing experts for the investigation of suspicious fires. These programs have been funded by the companies themselves, and are present in three states.[55]

Specific efforts can be made to increase the effectiveness of arson investigators. Because of the diversity in investigation procedures, uniform procedures based on effective measures would be called for by this topic. Current enforcement of arson laws is woefully ineffective in many jurisdictions. Sam Friedman noted:

> Forced by circumstances to continue parceling out claims checks to arsonists, insurers are sadly aware that their chances of digging up and substantiating enough evidence to even warrant filing a case, let along securing a conviction and a stiff jail sentence, are in most instances practically nil.[56]

However, even limited efforts have shown results.

The most recent example of a successful arson program is that of Kansas City. Supported by a grant from the now defunct Law Enforcement Assistance Administration (LEAA), the program provides for better investigation and results in more convictions. The program entails the following:

> Its main weapon is a special prosecutor who handles only arson-related cases. Together with a strengthened police unit and an upgraded lab, the city is recording some impressive court victories, with casualties surprisingly heavier on the arsonists' side, rather than on the side of the traditionally harried prosecutors.[57]

The article continues

> Besides the special prosecutor's salary, the grant paid for an expanded clerical and lab staff, along with special arson investigative equipment which "greatly aided evidence gathering."[58]

The results of the program are impressive:

> There were more arson cases filed in 1980 and 1981 than during the six previous years combined. The prosecution has maintained an extremely healthy 65 percent conviction rate, which stands out when compared to the national average of 5 to 6 percent. . . .[59]

If such dramatic results could be obtained nationwide, perhaps a reversal of the present incidence of arson would take place.

Crisis Intervention

Police in America fill many roles. As investigators they also serve as a type of social worker, especially in response to family crises. How an officer

responds to such a call for help ultimately affects both the outcome of any subsequent prosecution and any resolution of the problem. The situation itself can be very dangerous. Lee Bowker stated

> Although police officers tend to define domestic violence as failing to require legal intervention, there is considerable evidence that domestic assaults are extremely dangerous. Oppenlander (1980) found that victims were twice as likely to be injured in domestic assaults as in other assaults, and Gaquin found that spousal assaults were higher than other assaults in causing physical injuries, requiring medical care for the victim, requiring hospital treatment, and causing the victim to lose time from work. A study of the relationship between domestic violence and homicide in Kansas City revealed that police had responded to one or more disturbance calls at the address of either the victim or the offender in nearly 90 percent of the known domestic homicide cases. In half of the homicides, the police had made five or more calls during the past two years preceding the homicide.[60]

The need for an adequate response to the crimes involved is evident.

Many people may be reluctant to seek help in cases of spouse abuse. Children also are the innocent victims of abuse yet may never receive assistance. In the case of battered women, studies have shown inconsistent results regarding the number of assaults *reported* to police. Studies of randomly selected subjects have shown 55 percent in one national study of battered women and 9 percent in a study in Kentucky; other sources indicate between one-third and two-thirds of such assaults may be reported.[61]

The helpfulness of police in such domestic situations has been questionable. Professor Bowker of Wisconsin stated that: "Battered women often request that police officers arrest their assaulters, but officers generally talk them out of it or openly refuse to make the arrest."[62] Many studies measuring victim perceptions have indicated that the police are not viewed as being helpful.[63]

Numerous efforts have been made to alleviate some of the victims' concern. With the recent passage of Proposition 8 in California, many observers heralded the eighties as the decade of concern for crime victims. However, most of the supposed reform to help "victims" has been simply in the form of retribution, making sentences stiffer and altering arrest laws. Professor Bowker continues

> Even when arrest laws are changed to make it easier for police officers to use criminal sanctions when requested to do so by battered wives, officers may continue to avoid making arrests. When police officers persist in handling domestic disputes informally, they may fail to enter these disputes in official records in such a way that they could later be cited by battered women in a variety of legal actions against their husbands, or to defend themselves in court should they eventually kill their husbands in self-defense.[64]

This unwillingness to arrest violent husbands has been cited as one of the major factors in victims' low opinion of police.[65]

One solution to improve such investigative procedures would include training police to be sensitive to the needs of the victims and better equip them

to deal with domestic disputes. A common view of law enforcement ignores this role of police. When police are trained to deal with domestic violence the situation dramatically improves.[66] Early resolution of these domestic problems could prevent more serious crimes. Properly trained police would be more likely to refer problems to appropriate family support agencies when the need arises. This includes not only spouse abuse, but other potential problems of domestic violence, including child abuse. These techniques may also prove useful in the investigation and subsequent treatment of rape victims.

Rape

Hundreds of thousands of rapes are reported each year, and thousands more occur yet are never reported. Reasons for not reporting rapes vary; however, helpful attitudes of police and subsequent treatment of victims increases victim willingness to contact authorities. In order to prosecute rapists, police must be contacted and evidence must be gathered. Often, through shoddy investigative techniques, physical evidence or other information is lost. To combat this problem, several actions need to be taken. Police and hospital personnel must be trained in the handling of rape cases. Because of the nature of the crime, special procedures must be followed. Hospital staffs must be aware of the need to gather evidence in a manner that avoids further traumatizing the victim. One way to do this is to have special units devoted to rape care and investigation. Another is to have readily available techniques to gather information. In Illinois the use of the "Vitullo" evidence kit assists hospitals in the gathering of evidence.[67]

Coupled with better evidence gathering is the need to offer counseling to the victim. One possible case area would be for affirmatives to provide direct assistance to victims. Public knowledge of such assistance would increase the number of victims willing to prosecute and later testify, often itself a traumatic experience.

Another major crime afflicting society is the high incidence of drunk driving.

Drunk Driving

The fact that people drink and drive is a sad commentary on American lifestyles. With the formation and political lobbying of such groups as Mothers Against Drunk Driving (MADD), this crime is now closely scrutinized by legislatures. The scope of the problem is vast:

> Some 50 percent of all drivers killed each year have blood alcohol concentrations (BAC) in excess of the level for presumed intoxication, 0.10 percent. In single vehicle crashes, where it is more certain who is at fault, upwards of 65 percent of those drivers who die were legally drunk. Over the past ten years, the proportion of highway deaths involving alcohol has averaged a tragic 25,000 per year. Thus, a straggering one quarter of a million Americans have lost their lives in alcohol related crashes in the last decade. The cost of drunk driving has a high economic cost to this country

> as well. A conservative estimate of the total economic cost of drunk driving is put at approximately 25 billion dollars a year.[68]

With such carnage on our nation's highways, the need for an effective remedy for Driving While Intoxicated (DWI) is obvious.

To reduce these deaths several changes can be attempted. Requirements for devices in automobiles that would prevent the drunk from using a car have been suggested. Drivers and occupants should wear seat belts.[69] Others support such in-car safety devices as the installation of airbags to prevent death from vehicle crashes. However, these solutions do not obviate the need for better enforcement of the law. In Maryland, roadblocks are used on weekend evenings to catch drunk drivers. When combined with enforcement, such technical solutions will be optimal. Better training of police, stricter laws, and better methods of finding drunk drivers are a few of the items to be considered.

Many police agencies give officers less than adequate training in this problem area. The National Highway Traffic Safety Administration (NHTSA) notes

> Many law enforcement officials have not been trained in methods of detecting drunk drivers. DWI offenders often escape being apprehended because officers are not alert to such symptoms as driving in spurts or very slowly, overshooting traffic signs, delay in turning, lights on, driving close to the curb, jerky starting and stops, and driving with windows down in cold weather. When a driver is stopped on suspicion of drunk driving, officers often have difficulty in determining the level of impairment because the psychomotor tests presently used are not very reliable. Our expectation is that both the number and quality of DWI arrests can be increased through a combination of expanded training, improved psychomotor tests, and greater use of portable breathtesting equipment.[70]

This lack of training may be due to the failure to set a high priority on DWI enforcement. NHTSA reported

> Research in factors influencing DWI arrests has shown that management support plays a critical role in determining the level of enforcement. It also shows that a lack of support from police command officers results in low levels of effort from the officers in the street; and when management encourages strict and effective enforcement of drunk driving laws, the patrol officers tend to enforce DWI laws more actively.[71]

Hence, a change in the status given DWI enforcement would increase the enforcement of current laws.

One highly publicized method of increased enforcement is the implementation of new and stricter laws. The federal government late in 1982 made it attractive for states to alter their laws to conform to new standards:

> Under the new law, states would be eligible to receive a basic grant (30 percent of the state's annual allotment of federal highway safety funds) by satisfying the following four basic criteria put forth in the legislation:
>
> —Setting a .10 percent blood-alcohol concentration standard for legal intoxication.

> —Providing prompt suspension of the driver's license for no less than ninety days for first offenders and for no less than one year for repeat offenders.
>
> —Requiring a mandatory minimum sentence of forty-eight consecutive hours in jail or ten days' community service for repeat offenders.
>
> —Increasing enforcement of state drunk driving laws supported by public information.[72]

If the new law has the desired effect, many laws concerning the enforcement of DWI will become more uniform. However, in many states the law still allows for the refusal of a blood-alcohol test albeit with varying consequences. It is the right to refuse to take such a test that allows many drunk drivers to escape prosecution.

Many methods of finding drunk drivers have been suggested. One of the most significant to civil rights attorneys is the utilization of "random" stops by police. In some Scandinavian countries random stops have been used for years, resulting in auto death rates much lower than in the U.S.

James Fyfe commented upon the risk that such tactics entail. He states

> Police officers quickly learn that "car stops" are only slightly less onerous events than "family disputes." Car stops are dangerous and full of uncertainty: Officers can never be sure whom they are stopping or whether seeming mere traffic violators are actually wanted felons.[73]

Further, government statistics bear this risk out:

> U.S. Department of Justice, Federal Bureau of Investigation, *Uniform Crime Reports for the United States, 1980* indicates that seventeen of the 104 American law-enforcement officers feloniously killed during 1980 died at "traffic pursuits and stops." The same report indicates that another 6,277 officers were assaulted at such events during 1980.[74]

Therefore, weighed against the possible advantages of roadblocks and random stops in apprehending drunk drivers or other criminals must be the risks involved with such procedures.

Even without the known risks, the benefits are uncertain. Professor Fyfe adds

> Police agencies have also encouraged officers to stop motorists in cases not involving clear violations or articulable grounds for suspicion. They have done so on the assumption that such activities are likely to deter and detect drunk driving, auto thefts, unlicensed driving, and other violations threatening to life and property. Data to support that assumption, however, are simply not available: there exists little, if any, research that reports upon the effectiveness of "random" police stops of motor vehicles as either a crime deterrent or a crime detector.[75]

Beside the lack of data supporting the effectiveness of random stops, the U.S. Supreme Court has ruled such stops violate the Fourth Amendment. However, the Supreme Court did not require a total ban on this procedure, only on procedures that vested vast discretion in the police. The Court stated in deciding the case of *Prouse v. Delaware* that

> This case does not preclude the State of Delaware or other states from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion. Questioning all oncoming traffic at roadblock-type stops is one possible alternative.[76]

Hence, such procedures, while helping find drunk drivers, may prove too damaging to civil rights. A case can be made then, for the uniform adoption or the uniform prohibition of such techniques.

Related to drunk driving problems is another aspect of police officer safety. This one concerns the use of force by police in arrests and violence against police in the performance of their duties.

Deadly Force and Violence

Police are involved in the investigation of violence and, in some instances, are the instigators of violence. The approach that police take in response to violence determines some of the direction that violence will take. Those techniques for dealing with domestic disputes may also apply to communal violence. In addition, the control of the use of deadly force by law enforcement personnel is needed.

It has been charged that violence by police tends to be directed toward minorities. While minorities are shot and killed by police officers, as are others, debate as to the meaning of these figures is important. One study states: "that the high mortality rate of blacks in police shootings seems to result primarily from community characteristics, such as the high general rate of violence in the inner cities, rather than from a tendency among police to treat blacks and whites differently solely because of race." Yet this same study concludes "overall, the data available for decision-making are slim, and the need for research great."[77]

A number of regulations governing the use of force by police exists. Many laws legalize the use of force by police only in given situations. Arnold Binder and Peter Scharf reported that

> As of 1976, twenty-four states had justification statutes directly reflecting the common law rule (an arresting officer could use deadly force to prevent the escape of a fleeing felon—but not a fleeing misdemeanant), and seven other states had statutes allowing deadly force only when there was violence or the danger of violence.[78]

The California Supreme Court generated a stricter rule interpreting the California Penal Code as prohibiting deadly force unless the felony is violent, a forcible and atrocious one where the fear of death, serious bodily harm, or other major concern is involved.[79] The effectiveness of statutes regulating use of force is suspect. Dr. Peter Manning, of Michigan State University, analyzed the current situation and noted: "legal controls are weak, substantive case law is inconsistent, and departmental regulations and policies on the use of force variable."[80] Perhaps new laws, regulations, and policies are in order.

New department policies could be fashioned based on the California restrictions regarding fleeing felons. Albert Reiss, professor of sociology at Yale, elucidates other governmental possibilities:

> Governmental control of force can be accomplished in a number of ways, but principally by controlling opportunities for the use of deadly force, institutions and the organizations must be altered, whereas to control decisions to use it, organizations must manage them.[81]

He continues

> Restricting opportunities for the legitimate use of force appears effective in reducing its use and the harmful consequences of injury and death.[82]

Professor Wilson and others advocate other measures:

> One such policy recommendation: that the police think more seriously and imaginatively about ways of detecting and confiscating guns illegally in the possession of persons on the street. If they are to do this, they must be supported by a criminal justice system willing to see significant penalties imposed on persons convicted of carrying illegal, concealed weapons.[83]

Forms of gun control are debatable solutions to these problems. It could be argued that, with local, state, and federal gun laws varying from total bans to requirements for possession, a uniform standard could prove useful to police. For instance, Manning believes a national registration plan would certainly aid in the investigation of weapons offenses.[84]

Violence against police, by police, and by others against civilians concerns everyone. However, some aspects of crime affect only subpopulations, such as crime against the elderly.

Crime Against the Elderly

Over the past years the general debate on crime has been highlighted by dramatic representations about crime against elderly people. Because of age and income, many elderly suffer from the effect of crime more than younger people. For example, not only is an older person more vulnerable to being accidently killed during the commission of a crime, but also

> one study conducted in Portland, Ore., found that when the elderly are injured as a result of a crime, many—well over one-quarter—are dead within a year, not so much because of the injuries sustained in the attack as because of "a terrible sense of violation. A lot of old people are willing their own deaths as a result of this."[85]

The fear alone may be enough. In response, special police units have been set up in some areas focusing on the investigation of crimes against this elderly segment of our population.

The total number of crimes committed against the elderly is not that large. One study demonstrates

> The most extensive study of crime and the elderly, released late last year was compiled by the Criminal Justice Research Center in Albany, N.Y.,

> and sponsored by the federal Bureau of Justice Statistics (BJS). The study examined data from twenty six major cities and concluded that "the elderly have the lowest aggregate rate of victimization." It also concluded that the elderly were "the least likely to be either attacked or injured, and when injured, serious injury was rare." Furthermore, the study said, the elderly were no more likely to be victimized by juveniles than by older offenders.[86]

However, despite the uncertainty suggested by such research data, special units have been set up in several jurisdictions. Gerontologists are aware that many crimes are not reported.

Along with popular and media attention on these crimes has come an increase in the number of special units dealing with the elderly. The complaint from the aged arises: "many departments, while taking note of the situation, have not undertaken specific effort, and have established no special units to address victimization of the elderly."[87] Others disagree, stating

> While advocates for the elderly would disagree, police officials say that in most cities the number of crimes against the elderly is not great enough to justify special units. The police have some research evidence on their side. A recent study by the University City Science Center in Washington, D.C., concluded that "in light of the operational realities and budgetary realities facing most departments, there are indications that such programs may not constitute the most effective use of limited police resources."[88]

However, relief from budgetary constraints may be one approach to enhanced investigation that debaters may try to explore under this topic. In this instance, current realities would change, forcing a reconsideration of such conclusions.

The problems of the elderly are one of but many subpopulations that could be addressed under this topic. The investigation of crime is an important issue that deserves active research and careful consideration.

4. Civil Court Procedures

Resolved: That the United States should establish uniform rules governing the procedure of all civil courts in the nation.

Basic Concepts

Since this resolution finished in third place in the preferred poll it is unlikely that it will be selected as the final resolution next year. Yet the resolution on uniform rules for civil courts is still an important area for the debater to investigate. First, the justice system requires distinctions between criminal and civil courts. In a civil case one party claims that another has caused an individual injury or harm. This dispute between two individuals uses the court as a neutral forum to hear and adjudicate the dispute. The litigant must prove the case by a preponderance of the evidence, which is a less rigorous standard of proof than used for criminal cases.[1] *Words and Phrases* notes several dictionary definitions of the term *civil*:

> *Webster's Unabridged Dictionary* defines the ordinary meaning of the word *civil* to be: "Relating to rights and remedies sought by action or suit, distinct from criminal proceedings." *Bouvier's Law Dictionary* defines the legal or technical meaning of the word *civil* to be: "In contradistinction to criminal, to indicate the private rights and remedies of men as members of the community, in contrast to those which are public and relate to the government; thus, we speak of 'civil process' and 'criminal process,' 'civil jurisdiction' and 'criminal jurisdiction.' " *Anderson's Law Dictionary* defines the word thus: "Concerning the rights of and wrongs to individuals, considered as private persons, in contradistinction to criminal, or that which concerns the whole political society, the community, state, government: as civil action, case, code, court, damage, injury, proceeding, procedure, process, remedy."[2]

A second reason for close scrutiny of this resolution is the relationship between civil and criminal courts. In most jurisdictions, the same court can hear both types of cases. As was noted in chapter two, civil court judges are often switched to criminal court when there is a significant backlog of cases. Professor Edwin Tucker notes: "Courts have sought to enhance the likelihood that persons who are accused of a crime are granted a speedy trial. It is not uncommon for state courts when confronted with an especially heavy backlog of criminal cases to transfer judges who generally hear civil cases to criminal courts to help reduce the pending criminal caseload."[3] Thus, a clear understanding of civil cases given lower priority vis-a-vis criminal trials is needed.

Third, similar procedures and problems affect both civil and criminal proceedings. For example, issues surrounding alternate dispute resolution mechanisms, jury instructions, and use of videotaped testimony are equally germane to both civil and criminal trials.

The typical civil case begins with one party filing a complaint in the proper court against another party. A case number is assigned and the defendant is served a copy of the papers announcing the lawsuit. The defendant then files an answer to the complaint with the court. After this step, the defendant introduces a variety of pretrial motions to convince the judge to dismiss the case. If these motions are denied, both parties engage in the process of discovery, allowing each side to find out certain information upon which the opponent has based the claim. If no settlement is reached after discovery, the trial begins.

Many civil cases are tried before a judge without a jury. There are constitutional requirements for a jury trial in most civil cases, and some jurisdictions have juries of six rather than twelve persons. Another difference is that the verdict does not have to be unanimous as it must be in most jurisdictions in criminal cases. Once the judge or jury reaches a decision the losing party has the option of filing an appeal.[4] For additional steps in the process of civil litigation, debaters should examine the Federal Rules of Civil Procedure or the rules of procedure that apply to their states. These procedures provide important guarantees for the parties involved, but also contribute to delay in the courts.

Delay

Chapter two briefly discussed the problem of delay in the courts. The basis for the litigation explosion is found in the faith and trust Americans have placed in their legal system. State courts alone hear over twelve million civil cases a year, with annual increases projected at 10 to 25 percent in trial and appellate filings.[5] The litigation explosion occurs because as former Attorney General Griffin Bell argues, "The legal system is one of our country's accomplishments that Americans can be most proud of. Unhappily, we made too much of a good thing. As individuals, we use the courts too much. And our society has turned over to our judicial and quasi-judicial systems too many questions of public policy that timorous politicians are unwilling to handle themselves."[6] Among more specific reasons for the increase in litigation often offered by legal scholars are

- reliance on the courts compensates for public lack of trust in other institutions.
- courts are used to provide fundamental, sweeping social changes in the *status quo* which political institutions cannot make.[7]
- government regulations encourage citizens to rely on the courts for redress of agency grievances or for protection for new legislatively given rights.
- increased affluence and technology encourages use of courts to seek recompense for minor injuries.

- the Supreme Court has created new rights and remedies for civil litigation.
- the demographic shift from rural to urban America broke down traditional relationships and local methods for neighborly solution of many disputes.
- the increasing stress and complexity of modern life tends to quickly escalate conflict situations.[8]
- the United States has more lawyers per capita than any other nation. Litigation works to the economic advantage of attorneys who collect fees and retainers.[9]

The present system is actively promoting a variety of reforms to reduce delay while still providing an appropriate forum for resolution of disputes.

General Reforms

All levels of government are seeking solutions to court delay. The U.S. Justice Department has proposed a wide range of legislative solutions which would affect both the federal and state judiciary. Those proposals would expand "the power of federal magistrates, introduce in-court arbitration of certain types of civil cases, reduce or eliminate diversity jurisdiction, alter rules governing class actions, provide funds and technical assistance to encourage the development of mechanisms for resolving minor disputes, and reform intermediate appellate courts."[10] Other measures have been directed at management training and research. Edwin Tucker points to the actions which do not make the big news stories:

> A Federal Judicial Center to probe problems of the administration of justice has been established. An administrative office has been established within the federal court system and in a large number of state court systems. Judicial councils, composed of judges, have been organized. They study reports and proposals submitted by administrative officials.
>
> Collectively the judges undertake to improve court management. States and cities may recommend or even require that newly appointed or elected judges attend classes carried on under the direction of experienced judges so that the neophytes may quickly familiarize themselves with court procedures.[11]

Yet another approach has centered on procedural adjustments. Charlotte Carter, a staff attorney for the National Center for State Courts, notes the breadth of such reforms:

> Some jurisdictions have attempted to reduce caseloads by requiring prehearing settlement conferences or by diverting certain kinds of cases to arbitration boards or mediation or dispute settlement centers. Other jurisdictions have adopted measures that permit more flexibility and efficiency in handling increasing workloads with current judicial resources. Others have instituted procedural reforms, including rules that provide for tighter control and accounting of case flow, expedite the criminal appeals process, reduce time limits for filing briefs, require prompt preparation of transcripts on appeal, and restrict formal written opinions to cases that involve new or significant legal issues.[12]

New technology, such as videotaping witnesses or teleconferencing, holds some promise of promoting more efficient use of lawyer and court time.

Trial Judges

A recent study by the National Center for State Courts examined variables that might account for a high backlog of cases. The Center found that court size, the number of judges, the number of jury trials, increased workload of judges, and settlement activity had little effect on the time it took to hear a case:

> The most significant finding of this study, however, is that the pace of litigation is determined primarily by the local legal culture, defined as a stable set of expectations and informal rules of behavior on the part of judges and lawyers. The study concluded that local legal cultures can be changed to improve the pace of litigation if judicial personnel accept responsibility for reducing delay. Suggested techniques for partial or total court management of the pace of litigation include total case management from commencement to disposition, imposition of firm trial dates, limitations on continuances and special emphasis on the movement of older cases. Testing in pilot courts has demonstrated that these techniques do, in fact, work.[13]

As an editorial in a 1981 *ABA Journal* concluded

> The administration of justice is, however, the responsibility of trial judges. If they set trial dates with reasonable notice to counsel, they should take steps to be certain that the calendar will be open and the case can be tried. Then they should insist that counsel prepare adequately.[14]

Thus, one important ally in the battle to reduce trial delay is the trial court judge.

Appeals Courts

The huge increase in the number of trials has also resulted in a backlog of appeals. The American Bar Association has recommended the creation of intermediate state appellate courts to ease the burden of such delay. One of the major disadvantages of such an approach is the increased cost and delay for those litigants who must now make a second appeal. A time series analysis completed by Flango and Blair of the National Center for State Courts examined data from seven states and concluded that any reduction in volume of appeals was only temporary:

> From our examination of these seven states, we conclude that case filings and case processing time were reduced in the courts of last resort in the years immediately following the establishment of intermediate appellate courts. At best, however, this was an interruption of the trend toward increasing caseload in the state courts of last resort. Unless other measures were taken, such as increasing the size or jurisdiction of the intermediate appellate court, the caseload of the courts of last resort soon reached the same volume it would have reached if the intermediate appellate court had

not been created. Indeed, the establishment of an intermediate appellate court seems to encourage more initial appeals.[15]

Another proposal supported by the ABA is the establishment of a National Court of Appeals which would serve to reduce the number of cases heard by the Supreme Court. Former judge and Education Secretary Shirley Hufstedler notes that the creation of such a court "is a necessary step in alleviating the intolerable burden on the federal appellate system. The existing structure does not have the capacity to maintain stability, harmony, and predictability of the national law."[16]

Thus far, the procedural changes that could help the courts deal with the litigation explosion have not involved reducing access to the courts for parties seeking resolution of their disputes. The next section of this chapter will examine the issues involved in eliminating or directing certain cases before they reach the trial level.

Subject Matter

One method for reducing court backlog is to decrease the number of cases that can be filed in civil court. While this may be the unintended result of some of the previously discussed procedural reforms, direct measures for achieving this outcome have been suggested. For example, some legal scholars have urged establishing special courts to hear certain types of cases so that the number of lengthy civil cases now being tried before general courts may be reduced.

Specialized Courts

The advantages claimed by proponents of special courts include the following:

- specialist courts would have expert judges who are knowledgeable about complex areas of the law.
- such judges could resolve issues faster and better than generalist judges.
- more time could be devoted to deciding cases because the workload would be smaller.
- other courts' caseloads would be reduced as certain cases are diverted to specialists.
- uniformity and predictability would be increased as the same courts handle similar cases.[17]

Several specialized courts such as the Tax Court and the Emergency Court of Appeals have been evaluated as successful. However, opponents of special courts also have strong arguments to support their position:

- the basic assumptions and ramification of law will undergo less scrutiny if specialists decide cases.
- it will be easier for organized interests to exert political pressure for appointment of special judges who favor their positions.
- the public and lawyers may view special courts as "inferior," staffed by second class judges.

- most cases involve a wide range of issues which would result in fragmented decisions if special courts considered only those within their jurisdiction.[18]

A compromise between mandatory special courts and the continued use of general courts would be allowing the parties an option of using special courts. These tribunals usually hear lawsuits involving complicated issues such as patent or copyright infringement, antitrust violations, or product liability claims. Many local jurisdictions have courts specializing in traffic offenses.

A good example of a special tribunal is the small claims court. These forums were established to provide aggrieved consumers, tenants, and other citizens a place to present their claims with a minimum of confusion, cost, or delay without the assistance of lawyers. But this promise of quick and accessible justice for all has never been realized:

> Something happened to the spirit of the small claims courts. Instead of forums for "ordinary people," by 1960 we discover that collection agencies were the predominant users of small claims courts. For example, a 1961 study of Dane County, Wisconsin, reported that 93 percent of the small claims plaintiffs were businesses. Another study in Alameda County, California, showed that business and governmental bodies initiated 60 percent of all actions.[19]

The reasons for such use patterns are not difficult to discover. "The intricacies of filing a complaint, the disparity in sophistication between the individuals and businesses generally involved in disputes, and the lack of knowledge of the courts' availability all have contributed to the lack of use of the courts by their intended beneficiaries."[20] Given this difficulty it is not surprising that other avenues for meeting the needs of aggrieved consumers have been contemplated.

No Fault

Another method of removing cases from the courts' jurisdiction is to pass legislation requiring parties with certain types of claims to settle their differences without going to court. One such example is no-fault automobile insurance. This legislatively-induced concept requires each insurance company to pay the small damage claims of its insured drivers regardless of fault. Larger damage claims for more serious injuries may be the subject of a lawsuit if either party desires to file a claim. Another example is no-fault divorce. In 1969 California allowed spouses who agreed to dissolve their marriage to do so without spending the huge sum of money on lawyers and court costs often involved in proving that one party was to blame for the breakup. These changes also reduced the waiting period before a divorce was finalized. Virtually every state has followed California's lead and the court time spent on divorce cases has been reduced.

In theory, the no-fault idea could be applied to a number of other subject areas. However, most lawyers are opposed to any extension of the no-fault concept.

Denial of Claims of Action

A very direct method for reducing the time spent by the courts on some cases is to deny a claim of action for certain types of private wrongs. The effect is that the courts would be barred from hearing such cases. For example, attempts have been made to remove the federal courts from issues arising from busing of children to achieve integration or from consideration of abortion cases. Debaters may seek to develop affirmative cases based on the elimination of judicial scrutiny of a variety of social issues. Among those subjects presenting fertile areas for research are medical malpractice, product liability, wrongful life, wrongful birth, environment issues, and government immunity.

Alternative Dispute Resolution Mechanisms

While properly classified as a technique of controlling access to the courts, the use of private forums for the resolution of disputes is viewed with favor by most of the legal establishments. The major types of alternative dispute resolution mechanisms are community centers, settlement conferences, arbitration, and mediation. The *status quo* recognizes the need to encourage the expansion of such programs.

Community Centers

A tremendous need exists for nonjudicial resolution of consumer, landlord, merchant, family, or neighbor complaints that involve small sums of money, or are minor disputes basically caused by poor interpersonal communication. S. Shepherd Tate, past president of the American Bar Association, noted

> There can be no doubt that we must find ways to improve the settlement of small personal or monetary disputes without the formalities or prohibitive costs of court action. Many aggrieved parties, regardless of socioeconomic status, do not now have effective access to any forum for the resolution of disputes because the loss involved is generally far less than the time, money, and trouble required to recover it. And, in some consumer and other disputes, the traditional adversary system may not be the best approach.[21]

Griffin Bell demonstrated the growth of such programs when he observed: "In a survey conducted in 1981, the American Bar Association found 141 dispute resolution programs operating, including programs in nearly every major city of the nation. Ten years earlier, there had been less than six."[22] In 1980 Congress passed the Dispute Resolution Act which contained two major provisions. First, within the Department of Justice a dispute resolution resource center would be established to act as a clearinghouse for information about innovative programs. Second, federal grant money would be authorized to provide a state with funds to strengthen current programs and develop new dispute resolution systems.[23] Unfortunately, Congress refused to fund the program.

Besides the lack of money, few local residents know about the availability of such services. University of Southern California Professor Earl Johnson reported

> It is almost accidental if community members find their way to an appropriate forum other than the regular courts. Several other modes of dispute resolution already are available in many communities. Still, since they are operated by a hodge-podge of local government agencies, neighborhood organizations, and trade associations, citizens must be very knowledgeable about community resoures to locate the right forum for their particular dispute.[24]

When properly funded and linked to the justice system dispute resolution centers can be extremely effective. The Department of Justice funded these pilot Neighborhood Justice Centers where lay people were trained as mediators to resolve complaints. "A federal evaluation of the centers during their first fifteen months of operation found that nearly half of the 3947 cases referred to them had been resolved. Six months after the cases were resolved, a large majority of the disputants said the agreements were still in force and that they were satisfied with the process."[25]

Settlement Conferences

At both the appellate and trial level the use of voluntary or mandatory settlement conferences has proven effective. The exact format of these conferences varies with each jurisdiction, but generally requires that the attorneys for both parties meet with a judge or panel of judges to resolve the issues in a civil suit before either trial or appeal. As legal scholar B. E. Witkin explained

> (T)he settlement conference for civil appeals is an indispensable part of an efficient appellate system. The constantly expanding volume of appealed cases carries a loud and clear message: There will always be too many appeals to process in the traditional manner. Even though the settlement conference will not solve the problem of appellate overload by itself, that problem will never be solved without it.[26]

Data from jurisdictions that have adopted settlement conferences reinforces Witkin's optimism. Eight years ago, the California Third District Court of Appeals began requiring settlement conferences. The results were tabulated in the *California State Bar Journal*:

> Sacramento's settlement conference program has resulted in a substantial increase in the number of civil cases dismissed after the record has been perfected. The percentage of civil cases in which conferences are held has almost doubled since the inception of the program and approximately half of all civil cases in which there is a conference settle.
>
> Appellate settlement conferences have substantially reduced the amount of judge time necessary to process the civil calendar in Sacramento, and they have been primarily responsible for the elimination of the civil case backlog.[27]

Settling cases before trial "is one of the greatest potentials for assisting the courts to reduce their caseloads."[28] Examples of the use of such conferences demonstrate significant success:

- five panels with three judges on each panel conferred with attorneys in 115 cases in San Diego. More than 70 percent of the cases were settled.
- panels of one judge, one defense attorney, and one plaintiff's attorney settled almost 80 percent of the cases voluntarily submitted to it in San Bernardino County.
- The Superior Court of Riverside County inaugurated a system of settlement conferences, which settled 614 long cause civil cases during a ten-month period, the net effect of which was to reduce the time spent waiting for trial from nearly two years to just a few months.
- Los Angeles County uses three separate approaches resulting in the settlement of 50 percent of the cases that otherwise would have gone to trial.[29]

Arbitration

For many years, arbitration has been used to settle disputes under labor contracts. Arbitration involves submitting a disagreement to an impartial third party who makes either a binding or nonbinding decision on the parties. An experiment with mandatory but nonbinding arbitration for certain types of cases was begun by three federal district courts. Claims were for under $100,000 and a dissatisfied party could decide to go to trial. The Federal Judicial Center evaluated this effort and found that "about 40 percent of the arbitrated cases ended with the award being accepted . . . of those seeking a further hearing, 46 percent were settled before trial."[30]

When Orange County in California used retired judges to serve as arbitrators, it found considerable demand for their services. The type of cases referred included: "larger personal injury or wrongful death cases involving multiple defendants; primary and excess insurance carriers; structured settlements; and other cases requiring multiple, lengthy conferences, which are not readily available in the normal judicial channels. Conferences are available at a much earlier date than would otherwise be possible in the judicial system."[31] The results were similar to those achieved in the federal courts:

> During 1980 approximately 1,400 cases were referred from court in Orange County. About 30 percent were settled before hearing, slightly under 45 percent were heard, and the remaining 25 percent are pending. Of those heard, about 25 percent requested a trial *de novo* but less than 5 percent actually went to trial, having settled close to the original award.[32]

This use of arbitration is not without its detractors. Robert Gnaizda of Public Advocates, Inc. is concerned that the availability of expensive private arbitrators may create a dual system of justice with the rich opting for private judges while the poor must wait for the public courts to act. Constitutional problems may also be involved with deprivation of due process and a lack of equal protection.[33]

Mediation

Unlike arbitration and the courts which require a third party to decide a dispute, mediation is an attempt to aid the parties in reaching their own agreement.

It is perceived by many as a preferred method for truly settling disagreements. The Neighborhood Justice Centers, discussed earlier in this chapter, relied on mediation to resolve the problems brought to them. While virtually any potential lawsuit could be the subject of mediation if the parties agreed to it, indications now exist that mediation may be required in certain cases before a case will be heard by the courts. Recent legislation in California mandates that "parents with a custody or visitation dispute must attempt to mediate that dispute with the assistance of a skilled family counselor before they are entitled to a court hearing."[34] Before the state statute was passed a number of Superior Courts in California used mediation. The experience of San Francisco demonstrates the potential of such a procedure:

> Along with other procedural changes, mandatory mediation of custody and visitation disputes was instituted in February 1977—and the results have been dramatic. The San Francisco Superior Court had only five contested custody or visitation hearings or trials during 1980. In one year there were fewer hearings than there had been in a single day under the old system. As of November 1981, there were only three adversary hearings or trials with a dispute over custody or visitation in 1981.[35]

Another illustration of the use of mediation is to help prisoners and officials resolve claims that might otherwise result in lawsuits. Prisoners file a large number of complaints with the federal courts:

> During the last half of the 1960s, inmate suits doubled, and 16,000 were filed in 1970. For the ten-month period ending June, 1981, nearly 28,000 suits were filed. Much of this reflects the dramatic rise in the prison population, from 220,000 in 1960 to 350,000 as of June, 1981, according to a Bureau of Justice Statistics Bulletin. But while prisoners numbered about 1.5 percent of the U.S. population in 1981, they filed 15 percent of the total federal suits.[36]

Since 1980 the United States District Court for Maryland has given prisoners who file civil rights actions the option of submitting their complaints to voluntary mediation. The intent was that this method would allow the court to reserve time to hear the more serious cases.[37] Mediation might also serve to open lines of communication between inmates and staff so that complaints that are serious to prisoners but frivolous in the eyes of the law may be resolved to the mutual satisfaction of all parties. A systematic evaluation of this program has yet to be published but the project should provide a basis for evaluating the role of mediation in the legal system.

Parties and Actions

Not everyone who has a complaint against another person, government agency, or business can have the courts decide the grievance. A party needs legal standing to sue and the complaint must be an action the court can hear. For a civil action an indigent litigant has no constitutional right, as one has in criminal procedure, to have an attorney appointed by the courts.

Indigents and Representation

The United States is "the only western democracy without a legislative or constitutional guarantee of counsel for indigent civil litigants."[38] In an adversary system like that of the United States, the ability to pay is directly related to the quality of representation:

> The contributions made by legal counsel, expert witnesses, and investigators may be crucial elements in determining how a court will rule. Patently an indigent is generally at a disadvantage when battling an affluent opponent. A litigant's strategy and tactics may be but a shadow of what they might have been if he or she possessed the wherewithal with which to obtain the very best tools so as to prove his or her side of the case and to refute the evidence of his or her opponent.[39]

This does not mean that the poor receive no help from the present system. Federal judges do have discretionary power to appoint attorneys for indigent litigants under 28 U.S. Code section 1915(d).[40] Most states also have statutory provisions that allow for judicial assignment of lawyers to represent the poor. However, such procedures remain discretionary as Professor Tucker notes:

> Congress has provided that a federal court may request an attorney to serve as counsel for an indigent litigant in a civil proceeding. This is a matter for judicial discretion. Courts generally assign counsel only in unusual cases, requiring that the petitioner establish a compelling and meritorious need. A court cannot compel an attorney to comply with a request that he or she is not entitled to compensation from the federal government. State law may empower a state court under specified conditions to assign counsel to assist indigents in civil cases.[41]

Most states and the federal government fund legal service programs which provide assistance for the poor in such cases as eviction, family law problems, repossessions, disability and welfare claims, and wage garnishments. However, these programs have a relatively low priority and are subjected to severe budgetary cuts when government budgets are tight. Lawyers are encouraged by their bar associations to volunteer time for *pro bono* work on behalf of the poor. However, the response is uneven and, at best, it represents a partial solution to the problem of adequate representation for the poor in civil cases.

The *status quo* also provides for waiver of filing fees for some categories of civil cases if the party is too poor to pay. This concept, known as *in forma pauperis*, requires the court to evaluate the probability of "the indigent succeeding in the litigation. If the court decides that it is impossible that the indigent will be successful before the tribunal, his or her request for permission to proceed *in forma pauperis* will be denied. Patently this doctrine is not intended to accord the same legal rights to all indigents or to treat the poor and the affluent alike."[42] In addition, the Supreme Court has acknowledged that there are certain types of fundamental civil rights, such as divorce proceedings, that a party cannot be deprived of because of lack of financial ability.

This is clearly an area for the affirmative to develop uniform procedures providing representation for poor litigants and access to the courts regardless of ability to pay.

Class Actions

Both federal and state procedures allow a lawsuit to be filed on behalf of a large group or class of people who have suffered similar injury from a defendant. These lawsuits are referred to as "class actions." Tucker offers additional information:

> In a class suit, one or several persons, each having suffered similar harm due to the defendant's same form of wrongful behavior, maintain a single suit in which they ask for damages on their own behalf as well as on behalf of all other persons who have been similarly harmed. If the liability of the defendant is established, the court will enter a judgment in favor of the named plaintiff or plaintiffs and all others on whose behalf the suit was brought. Any member of the successfully represented class who desired to secure the amount of money due to him or her need not personally commence his or her own lawsuit, but need simply show the court what portion of the total award he or she is entitled to receive.[43]

The technical aspects of such lawsuits vary among jurisdictions but usually require that each plaintiff have a minimum distinct claim (in federal court this amounts to $10,000 each) and that notice be given to find as many members of the class as possible. Rule 23 of the Federal Rules of Civil Procedure also lists the prerequisites for such joint action:

> (a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims and defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.[44]

There are strong arguments in favor of strengthening the procedures for allowing class action suits. Among the more commonly cited arguments are the following:

- reduces the number of cases filed by consolidating similar claims, thus saving court time.
- reduces the risk of different trial courts reaching inconsistent results.
- decreases the overall costs for both plaintiffs and defendants who need only deal with one lawsuit instead of hundreds or thousands.
- allows poor plaintiffs to have access to the courts through judicial awards for attorney fees for representing clients in such lawsuits.
- awards compensation to all similarly situated members of the class, rather than the named plaintiff alone.

Class actions are filed against manufacturers, government agencies, or other parties whose products or actions adversely affect a large number of people.

Restrictions proposed on class actions attempt to eliminate abuses caused by frivolous lawsuits. They may also reduce the effectiveness of this legal mechanism. For example, federal appeals courts recently have refused to allow a "class" to be created for the victims of the Kansas City Hyatt Hotel disaster and another court "refused to continue a class suit involving users of the Dalkon Shield intrauterine device."[45] Other courts have dismissed frivolous suits or slashed awards of attorney fees.[46] One of the major arguments against federally funded legal services programs is that they promote class action suits by the poor against the government. Congress is considering legislation that would restrict legal services participation in class action suits against the government. Ralph Abascal of the California Rural Legal Assistance Program notes the type of actions now filed:

> The typical legal services class action against government involves an underlying claim that a subordinate level of government is acting in violation of law as dictated by a higher level of government—for example, a claim that a county welfare department regulation violates a state statute or regulation, a state welfare department regulation violates a federal regulation or statute, or a federal welfare regulation is contrary to a congressional statute. Nearly all class actions against government officials are merely law enforcement actions, as are class actions against private entities.[47]

This is a productive area for developing uniform procedures since each jurisdiction has different rules and the abuses in the use of class action lawsuits encourage reform.

Prohibitions

Legal prohibitions restrict the ability of one party to sue another. A long-standing prohibition on children suing parents has recently been relaxed in a limited number of instances:

> With the change in attitude toward family, rejection of the premise that in a variety of ways women are inferior to men, and belated concern with child's rights, judicial approval of intrafamily immunity has eroded. Today married persons may sue one another. The law had long recognized the right of a child to ask a court to adjudge his or her rights and the rights of his or her parents under a contract, or a will, or to property, or to an inheritance. More recently, the right of a child to sue a parent for intentionally inflicting an injury upon him or her has been recognized. The newest addition in this area has been acknowledgement of a right of a child to sue his or her parents for negligently causing him or her injury.[48]

While allowing some lawsuits is legitimate, especially where insurance companies will ultimately pay the judgment, extensions of this concept could create serious problems. Examples of such ill-advised suits might involve claims for not sending the child to expensive schools or for giving birth when parents were informed that the child might be handicapped.

Other illustrations of parties or actions that have undergone change include abortion, rights of illegitimate children, visitation rights for grandparents,

adoption proceedings, and immunity of government officials. The debater is free to investigate *who* should be allowed to file lawsuits and *what* constitutes a cause of action. The mechanism for implementing those concerns lies in modifications of civil court procedures.

Trial Procedures

While indigents have no constitutional right to a lawyer in civil matters, a number of other procedures are guaranteed, especially if one of the parties involved is the government. Joel Gora of the American Civil Liberties Union lists several civil rights protected by judicial procedure:

- right to a hearing.
- right to proper notice of the nature of the action.
- right to confront witnesses, review evidence.
- right to cross examine witnesses.
- right to a jury trial if a court will hear the case.[49]

Many of these procedural rights are similar to those enjoyed by the accused in a criminal trial. Proponents of this debate resolution may wish to recommend extending additional procedural guarantees to those involved in civil litigation. The material in chapter five provides information on these case areas.

Other court-related procedures have been identified as needing significant modification. A few samples of such reform will be presented. Alexander Yakutis of the Judicial Council notes

> A catalogue of all subjects relating directly or indirectly to change and improvement in the way the civil business of the courts is conducted would be a lengthy one. Expanded publication of appellate court opinions, access of electronic media to the courtroom, acoustical recording of proceedings where no court reporter is available, court interpreter standards, innovations in jury management—these are only some of the matters of current interest on the margins of the reform of civil procedure.[50]

Abuse of Discovery

Perhaps the major argument on civil procedure reform centers on allegations of abuse of the discovery process. The ABA Advisory Committee on Civil Rules of the Judicial Conference's Committee on Rules of Practice and Procedure reported serious and widespread abuse of the discovery process. Discovery is being misused and overused in far too many cases.[51]

> One of the critics of the current discovery process, William B. Lawless, has stated that 'discovery is at the heart of the problem of delay and the high cost of litigation' and that delay and high cost 'are strangling justice' and devouring clients. At the Pound Conference Francis R. Kirkham held that the purpose of discovery has been 'perverted,' and Simon H. Rifkind declared that discovery proceeds today with no serious regulation and that it has become, in many areas of the law, a sporting match and endurance contest.[52]

These allegations are challenged by Julius Levine of Boston University's law school who notes the results of two independent studies of discovery procedures:

> Examination of the incessant allegations of abuse of federal discovery establishes two propositions. First, there has not been pervasive, general abuse of discovery in the quantitative sense of overuse. Second, there are adequate powers in general under the federal rules to check any attempted abuse in the quantity or quality of discovery used or in resistance to discovery.
>
> A third conspicuous conclusion has emerged consistently from statistically significant empirical examinations into allegations that discovery is abused—that the quantity of discovery in most cases is small.[53]

Joseph Ebersole, deputy director of the Federal Judicial Center, concludes that discovery problems will not be resolved by any single solution and echoes Levine's contention that judges can control abuses through use of their current powers:

> Many of the factors (leading to abuse of discovery) cannot be directly controlled either by rules or by judges—for example, the relative size of law firms, differences in the parties' resources, and the acrimony between the parties. When they are aware of the factors that may be operating in a given case, however, judges are in a position to control and mitigate the effects. This control can prevent the occurrence of problems in some cases and can lead to timely and effective correction action in others.[54]

Judges

One major component of a smoothly functioning judicial system is competent, well-trained judges. As noted before, the judge has a critical role to play in the quality of justice provided in the trial process. Support for monitoring and disciplining errant members of the judiciary contines to grow. Professor Tucker notes: "There is an escalating level of insistence that there be an end to the secrecy, lack of diligence, and indifference which have generally marked the reaction to complaints which charge lack of judicial integrity and competence."[55]

Solutions to this problem include developing plans for electing judges, removal of certain cases from the court, or establishing recall procedures for judges who demonstrate a lack of professional responsibility. The states have responded to enhance the integrity of the judicial process through increased training of judges. In addition, most states have established judicial conduct organizations to investigate charges of incompetence or lack of fitness to hold office.[56]

Juries

In general, if a trial is provided for in civil contests, there is a right to request that it be heard by a jury. The Constitution provides such a right in all disputes over twenty dollars. However, the structure and rules of civil juries differ

greatly. The U.S. Supreme Court has ruled that state civil juries can be composed of fewer than twelve persons and that the decision need not be unanimous. This procedure is in marked contrast to federal criminal procedures which guarantee a twelve-person jury and require a unanimous decision. Additional information on these issues will be presented in chapter five.

In addition to these modifications, pressure now exists to remove juries from complex cases. Two U.S. courts of appeals have ruled in opposite ways on this issue. Proponents of this policy argue that the ordinary jury does not have the expertise to render an informed judgment when lengthy or complicated legal or factual issues are presented. Examples frequently cited are cases in antitrust, patent, copyright, or product liability. Mark Nordenburg of the Federal Judicial Center suggests alternatives:

> Two alternatives, therefore, deserve consideration. The use of specially qualified juries offers hope that by modifying jury selection in complex cases, the courts can achieve the widest practicable use of juries as the ability of jurors to understand and resolve difficult issues improves. The use of expert nonjury tribunals, on the other hand, might provide for more fully informed, rational and efficient decisionmaking—though the jury would be eliminated in a narrow range of cases.[57]

Other scholars are not sure that removing juries from complex cases would result in better decisions. Peter Sperlich of the University of California, Berkeley, concludes:

> adoption of a complexity exception (however defined) would create grave practical problems, that it probably could not be applied rationally and consistently, and that it is not likely to produce better verdicts. Finally, taking note of the "economic" argument against the jury, I maintain that even if there were conclusive evidence that bench trials result in improved efficiency and cost savings, the virtues of trial by jury are even greater: it provides individualization of justice, a check on judicial power, citizen education, a means by which community values may influence the justice system, and a basis for popular acceptance of judicial decisions.[58]

Rather than abandon the jury system in such cases, a variety of procedural reform would increase the effectiveness of jury decision making. Among these changes are

- reach decisions step by step on sequential litigation.
- split a case so juries handle the nontechnical aspects.
- train juries in group communication skills.
- train jury forepersons as group facilitators.
- videotape testimony for juror recall.
- videotape judge's instructions for replay.
- give jury instructions at beginning of the trial.
- use visual aids to demonstrate important issues.
- allow jurors to ask questions during the trial.[59]

Procedural modifications, properly researched and applied, would enhance the judgments of every jury.

Damages

The final sample of reforms in civil procedure center on the allocation of damages. Currently most damages are awarded to plaintiffs in a lump sum at the end of a trial. Recently, provisions for periodic payments throughout the life of the victim rather than one large award have been discussed. The advantages of such an approach include

- greater certainty of meeting real expenses.
- better protection against inflation.
- victim will not pay federal income taxes on the payments.
- encouragement of more settlements.
- defendants benefit from continued use of funds.[60]

Other changes contemplated in assessing damages or liability are creating a tort for risk of injury during medical treatment, modifying the doctrine of strict liability, changing in medical malpractice liability, and modifying the concept of negligence.

Conclusion

The topic of procedures in the civil courts fills volumes in most law libraries. This chapter has presented a brief overview of a few of the important concepts which debaters need to understand. The next chapter will examine procedures used in criminal courts.

5. Criminal Court Procedures

Resolved: That the United States should establish uniform rules governing the procedure of all criminal courts in the nation.

Basic Concepts

Several major differences between criminal and civil cases, courts, and procedures have been developed in the previous chapter. Unlike civil actions, which are based on private individual injuries and are compensated by money damages, criminal actions arise when a person is accused of committing a public crime and, if found guilty, must make recompense to society. The government brings an action on behalf of all citizens and must prove its case "beyond a reasonable doubt," a standard of proof more difficult than the preponderance of evidence test in civil cases.[1]

One major distinction must be made. This resolution deals with procedures, not the crime itself. *Words and Phrases* elaborates

> As relates to crime, "substantive law" is that which declares what acts are crimes and prescribes the punishment for committing them, and "procedural law" is that which provides or regulates steps by which one who violates a criminal statute is punished, and "criminal procedure" refers to pleading, evidence, and practice.[2]

Black's Law Dictionary offers additional comments on the nature of procedure:

> The mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right, and which, by means of the proceeding, the court is to administer; . . . devotes the body of rules, whether of practice or of pleading, whereby rights are effectuated through the successful application of the proper remedies.[3]

An expansive view of the concept of criminal law court is supplied by Judge Richard Neely: "When lay people speak of the courts, they often mean judges and attendant judicial staffs of clerks and secretaries. However, the term *courts* must be expanded when we talk of criminal law to encompass all of the supporting agencies that either feed criminals to the judges or receive them after conviction."[4] Acceptance of this definition would allow the debater to incorporate many of the case areas discussed in the law enforcement chapter as well as issues involved with prisons. The more generally accepted definition of *court*, however, limits its purview to "the application of the law to controversies brought before it and the public administration of justice."[5]

A synopsis of the steps involved in the arraignment, trial, and sentencing in criminal courts in California is provided in Figure 3. This is typical of the stages of court procedure in most jurisdictions. For information on other areas covered by criminal procedure, a quick check of the *Federal Rules of Criminal Procedures* or various state procedure statutes will provide an index of topics relevant to this resolution.

After a brief analysis of delay in criminal courts, this chapter will follow the steps illustrated in Figure 3 and provide potential case areas as each stage of criminal court procedure is examined.

Delay

The volume of criminal litigation in state courts is increasing dramatically. According to recent national estimates, state courts process annually 65 million traffic cases, 11 million criminal cases, 1.2 million juvenile proceedings, and 130,000 appeals.[6] The rapid increase in civil filings documented in chapter four is paralleled by an equally precipitous growth in criminal trial and appellate cases:

> Legislation enacted over the past decade that created new legal rights or new opportunities for legal controversy, such as environmental and consumer protection laws and revisions in small claims and domestic violence statutes, may account for much of this increase. A related problem of equal importance to the state judiciaries is the delay in processing and adjudicating cases filed in state courts. The substantial backlog of pending cases traditionally has been attributed to an imbalance in caseloads and workloads among judicial districts, a shortage of judges, inefficient case processing and an overabundance of procedural options and safeguards.[7]

Many of the reforms noted in chapter four are also used to reduce backlogs in criminal cases. At least one study has indicated that court resources have increased more rapidly than the inflow of new criminal cases. Herbert Jacob of the Governmental Response to Crime Project studied ten cities in various parts of the country from 1948 to 1978. The principal finding of the study was that, contrary to conventional wisdom, "courts have not been neglected or starved of resources during the rapid rise of crime in these ten cities. . . . While resources (as measured here) increased more rapidly than the inflow of cases, case processing seems to have lagged behind to produce an ever increasing backlog."[8]

In addition to better management practices, judge training, and modifications to the trial and appeals process, several justice reform measures are addressed primarily to the criminal courts. For example, many jurisdictions have versions of the Speedy Trial Act which requires trials within a limited number of days. Community Dispute Centers are being used to direct certain offenses out of the criminal justice system. These offenses are usually based on personal arguments or interpersonal disputes between neighbors or family members. Diversion to community centers saves resources and leads to better resolution of conflicts. Hearings and mediation "can be done at a lower cost

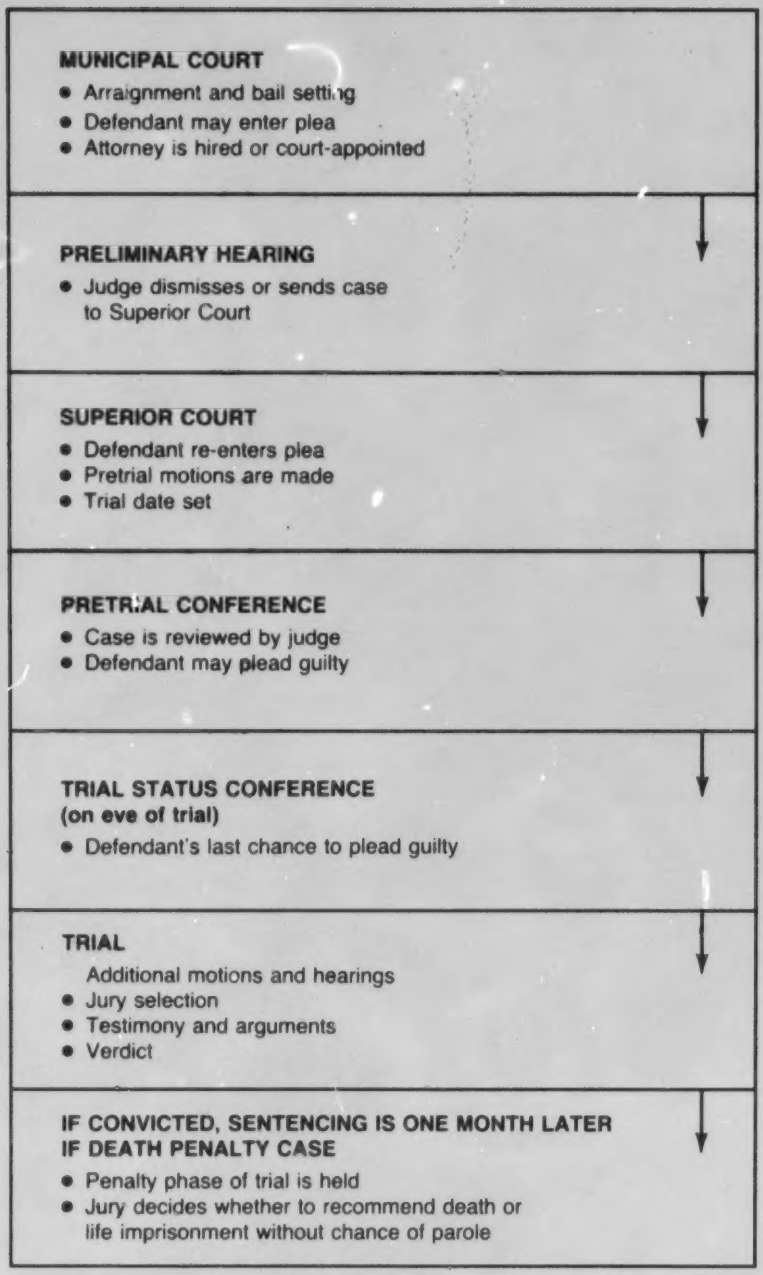
MUNICIPAL COURT
• Arraignment and bail setting
• Defendant may enter plea
• Attorney is hired or court-appointed
PRELIMINARY HEARING
• Judge dismisses or sends case to Superior Court
SUPERIOR COURT
• Defendant re-enters plea
• Pretrial motions are made
• Trial date set
PRETRIAL CONFERENCE
• Case is reviewed by judge
• Defendant may plead guilty
TRIAL STATUS CONFERENCE
(on eve of trial)
• Defendant's last chance to plead guilty
TRIAL
Additional motions and hearings
• Jury selection
• Testimony and arguments
• Verdict
IF CONVICTED, SENTENCING IS ONE MONTH LATER
IF DEATH PENALTY CASE
• Penalty phase of trial is held
• Jury decides whether to recommend death or life imprisonment without chance of parole

Figure 3. From the *Sacramento Bee*, March 13, 1983.

than courtroom proceedings, since it is not necessary for the police to serve warrants, there is no need for detention or to have bonding procedures, and lastly, there are no social and economic costs to the disputing parties."[9]

Limiting Jurisdiction

The past few years have seen a proliferation of bills to restrict the jurisdiction of federal courts. Some of the constitutional areas that would be removed from federal review are search and seizure, self-incrimination, and cruel and unusual punishment. This legislation is an admitted attempt to overturn unpopular Supreme Court decisions. The hope is that the constitutional balance between the state and federal systems as well as among the branches of government would be restored by such limits on an activist court. Opponents cite several potential disadvantages of this approach to judicial reform, including

- lack of Supreme Court review could eliminate uniformity of the law, resulting in confusion and conflicting judgments.
- federal judges would fear making unpopular, but constitutionally required, decisions.
- special interest groups would try to influence Congress to remove selected issues from court review.
- stability of the laws would be destroyed.[10]

Another jurisdictional issue is raised by the collateral review of state criminal convictions in the federal courts. The Conference of Chief Justices has criticized this review as needlessly adding a delay in the courts and undermining the integrity of the state court system. This conference recommends barring

> federal *habeas corpus* review of issues not properly raised in state courts unless cause and prejudice is shown for failure to do so, establish reasonable time limits within which a federal *habeas corpus* action must be commenced and bar federal *habeas corpus* review when the state court record provides a factual basis for the state court findings and such record was made under circumstances affording the petitioner a full and fair hearing on the factual issue. Enactment of this legislation would permit orderly and timely presentation of state prisoners' claims while promoting the finality of state criminal processes and ensuring proper respect for state court factual determinations.[11]

Decriminalization

Decriminalization refers to an action which repeals or reduces criminal penalties for certain offenses. The concept is most frequently cited when discussing so-called victimless crime such as prostitution, gambling, and use of illegal drugs. Many jurisdictions have removed minor traffic violations from criminal court via decriminalization. Nevada allows counties to legalize prostitution, and a number of states have reduced penalties for possession of small amounts of marijuana. Professor Tucker explains the rationale for such action:

"Decriminalization of some forms of misbehavior has been suggested for a variety of reasons, including decreasing the backlog of criminal cases and the belief that absent a victim, one's actions should not subject him or her to a criminal prosecution."[12] The moral justification for society's regulation of this type of activity is ambiguous. Some criminal justice scholars note that all of these areas have the potential to create victims, ruin lives, and endanger the public's health and safety. Continued enforcement of these laws also produces social inequities and economic costs. For example, over one-half million people are arrested each year for marijuana offenses, and, while eleven states have some form of decriminalization, penalties are formidable in other jurisdictions:

> Under federal law as well as the statutes of thirty-nine states, the possession of marijuana still carries criminal penalties, and in one jurisdiction (Arizona) a sentence of up to ten years combined with a $50,000 fine can result from the possession of only one marijuana cigarette. Such penalties can clearly have long-term consequences for the society as a whole when large proportions of the otherwise law-abiding population consume the drug for its euphoric effects.[13]

Of critical importance in discussing reform of criminal procedures is the limited ability to effect decriminalization under the restrictions of the debate resolution. If the more limited concept of "court" is accepted, an affirmative could bar courts from processing certain cases. However, the activity would still be illegal, subjecting the violator to police investigation and arrest. An approach the negative may wish to explore is use of a counterplan which repeals the law from the statute books, thus promoting true decriminalization.

Pretrial Procedures

After the arrest of a suspect but before a trial occurs there is a period of pretrial procedures which involve the court. This is one area of criminal proceedings that provides fewer safeguards for the defendant than either the police investigation or trial:

> Once the accused has appeared before a judicial officer and a determination of probable cause has been made, there is not necessarily any further right to have a preliminary examination in which the defendant may learn more and more about the prosecution's case or can examine potential witnesses. Similarly, in most states, a preliminary hearing is not required at all if there has been a grand jury indictment, the courts' equating an indictment with a finding of probable cause to arrest and detain, thus obviating the need for a hearing. Often prosecutors will delay the preliminary hearing until an indictment is returned and the right to such a hearing is lost.[14]

Joel Gora of the American Civil Liberties Union notes that the accused criminal is accorded fewer discovery rights than provided in civil cases. He explains

> Nor is the accused constitutionally entitled to learn about all of the government's evidence against him prior to the trial. While there must be pre-

> trial hearings—known as suppression hearings—on the issue of the legality of certain kinds of evidence which the prosecutor would wish to introduce at trial, to see if a confession was surrounded by proper safeguards or whether evidence was illegally seized by the police, the accused has no general right to pre-trial "discovery" of the prosecution's evidence.[15]

A closer investigation of the pretrial process yields several potential case areas.

Counsel

Right to counsel extends to all "critical stages" of criminal proceedings. This right includes not only the trial, but also police questioning, arraignment, and appeal. "The right to counsel is the mainstay of our entire adversarial system of criminal justice. The development of this right to have an attorney has largely been an attempt to insure equal justice to rich and poor alike."[16] The Sixth Amendment to the Constitution requires that the accused has a right to counsel in all criminal proceedings. If a party is too poor to afford one, the court will appoint and pay an attorney to represent an indigent defendant. This fundamental right now applies to both federal and state proceedings.

Several areas related to the right to counsel need further investigation. First, the accused is allowed to represent himself or herself if the judge is satisfied that the defendant can do so properly. Since this test is rather easy to meet, it may, in fact, work to the disadvantage of all but the most skilled defendants. Debaters should investigate the issues involved with elimination or restriction of this right of self-representation. Second, the right to counsel is provided to allow the accused an opportunity to counter the charges brought by the state. Unfortunately, no other constitutional guarantees exist for the other necessary components of a good defense for those unable to afford legal justice. For example, the services of investigators, experts, polygraph examinations, or scientific assistance in selecting juries need not be provided free to any accused. Such assistance remains at the court's discretion. Professor Tucker explains: "Congress has provided that in a federal criminal proceeding, if the court is satisfied that such services are necessary it may, at the expense of the government, arrange to furnish them. State law may offer similar assistance at public expense to indigent defendants."[17] Since an increasing number of such services are required for an effective defense, stronger guarantees of assistance to the indigent may be necessary if the goal of equal treatment between rich and poor is to be attained.

Grand Juries

The Fifth Amendment to the U.S. Constitution requires that indictments for serious federal crimes must come from a federal grand jury. While most states provide for indictment by a grand jury, in many jurisdictions prosecution can be brought solely on the basis of the prosecutor's charges. Benjamin Civiletti, former Deputy Attorney General of the United States, adds additional information:

> Grand jurors are laymen selected from a cross section of the community. The lead in conducting the grand jury's proceedings must, perforce, be taken by the prosecutor. But the prosecutor is not merely an invitee at these proceedings. No grand jury can indict without his concurrence. Thus, the government attorney has a constitutionally-based role as the representative of the executive branch, though he remains an officer of the court, responsible to it for his deportment in the grand jury room.[18]

Civiletti introduces the first potential problem with grand juries— the dual role of the prosecutor. Claims that most grand juries are merely rubber stamps for indictments brought by the prosecutor have often been raised. The nature of the process seems to encourage such beliefs.

> On the surface it might seem that the grand jury setting is well-designed to bring out the "worst" in government attorneys as advocates: the proceedings are secret; they are entirely one-sided; the rules of evidence do not apply. No federal judge or magistrate physically presides over the proceedings or even monitors them in any meaningful fashion.[19]

Dennis Golladay, a professor of history and political science, concludes

> Legally, the grand jury is an independent body convened by a court and simply presented with evidence by the prosecutor, a representative of the executive. But in reality there can be no doubt that the prosecutor controls the proceeding. Grand jury abuse, therefore, is in most instances synonymous with prosecutorial abuse.[20]

Another area of needed reform centers on the lack of procedural safeguards during this process. Such reforms have been a long-standing concern of civil rights attorneys. Joel Gora notes

> there are few, if any, procedures to control the grand jury's actions. A grand jury indictment can be based on illegally seized evidence, or hearsay evidence, or other matters which would be inadmissible at trial. Historically, grand jury deliberations are secret, and no adversary process exists inside the grand jury room. As a practical matter, grand juries are usually under the control of the prosecutor, even though they are technically an arm of the court. The prosecutor also has enormous discretion to present, press, or drop charges; yet there are very few judicial controls over that discretion.[21]

Some or all of these specific procedural issues can be explored for further case development.

A third issue surrounds the lack of secrecy in grand jury investigations. A General Accounting Office report issued in 1980 found hundreds of instances of public disclosure of privileged information over a two-year period.

> Included were 343 witnesses whose identities were revealed before indictments were returned. (Five of them were murdered, ten were intimidated and one disappeared, the report said.) The report also found that security breaches resulted in 147 grand jury targets being publicly identified before indictment; twenty-three grand jury investigations being dropped or delayed; the nature of 168 grand jury investigations being revealed; and the

> reputations of ten persons being damaged even though they were never indicted.[22]

The need for secrecy was best outlined by the Supreme Court in its 1979 decision of *Douglas Oil Co. v. Petrol Stops Northwest*. The Court explained five reasons for secrecy:

> (1) to prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before (the) grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes; (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.[23]

The General Accounting Office offered a series of possible reforms to reduce leaks of privileged information:

- screen grand jurors for conflict of interest.
- improve security practices of investigative and court personnel.
- develop a proposed amendment to Rule 6(e) to provide specific guidance for handling pre-indictment proceedings, grand jury subpoenas, and documents that tend to disclose what occurs before a grand jury.
- review the Jury System Improvement Act to assure confidentiality of grand jury names.
- establish guidelines setting forth minimum security requirements for grand jury materials.
- require custodians of materials to set procedures consistent with national guidelines.
- provide for audits by the Administrative Office of the Courts of all custodians to assure compliance.
- evaluate physical grand jury security and upgrade or modify deficiencies.[24]

Bail and Pretrial Release

The 1960s witnessed the growth of bail reform and pretrial release programs which significantly reduced the number of accused criminals held in jail awaiting trial. Today, these programs are viewed with suspicion by such diverse political opinion leaders as Chief Justice Burger, Senator Edward Kennedy, and President Ronald Reagan. A common fear expressed by those advocating a stricter approach to bail is that dangerous criminals who will commit more crime or flee prosecution before trial are released. Several key elements in proposed solutions to these problems would

- require the court to make an initial bail release decision based solely on the likelihood of the defendant's future appearance at trial.
- determine whether the release of the accused will endanger the community.

- permit the court to impose severe custodial restrictions when it finds that the defendant's release poses a danger to the community that cannot be alleviated by the imposition of less restrictive conditions.[25]

Pretrial status of the accused is important. The American Bar Association concluded: "deprivation of liberty pending trial is harsh and oppressive in that it subjects persons whose guilt has not yet been judicially established to economic and psychological hardship, interferes with their ability to defend themselves and, in many cases, deprives their families of support."[26] Gerald and Carol Wheeler noted the shortcomings of most research on pretrial release:

> There are three basic indicators of pretrial misconduct: missed court appearance, rearrest for new criminal charge while on bond, and escape from prosecution or fugitive status. Past research studies in these areas suffered serious shortcomings. Studies rarely controlled for time or followed defendants from arrest to disposition. Also, these reports seldom represented defendants from all modes of pretrial release. In addition, such analyses often failed to analyze outcome of all three misconduct areas from a single study population.[27]

Three recent empirical studies, which overcame many of these methodological problems, demonstrated that few released accused criminals flee prosecution, failed to appear, or committed crime while on bail:

> Available research data dispels the notion that hordes of bonded defendants escape prosecution. Other forms of pretrial misconduct persist but there is no evidence that high failure to appear and rearrest rates are widespread among criminal court jurisdictions. Furthermore, such misconduct is not scientifically linked to defendant characteristics or type of bail.[28]

Rather than restricting bail or other methods of pretrial release, other approaches could remedy any deficiencies in present programs. For example, speedier trials, reduction of multiple arrests during the pretrial period, and better supervision of bonded defendants have all been successful in reducing problems associated with pretrial misconduct.

Plea Bargaining

Plea bargaining refers to the "process of the prosecution reducing the charge or charges against a defendant in return for a plea of guilty"[29] to the reduced charges. Most authors indicate that 80 to 90 percent of all felony convictions are achieved through plea bargaining. The American Bar Association's Minimum Standards for Criminal Justice Section summarized the belief of most scholars:

> While some have suggested that bargaining for pleas should be prohibited, most commentators are of the view that the better avenue of reform lies in giving formal recognition to and controlling the negotiation of pleas. The latter position is taken in the standards.[30]

Among those reasons most frequently cited for the extensive use of plea bargaining are

- too many cases and too few prosecutors and judges would cause the justice system to break down if all cases went to trial.
- overcrowded prisons encourage judges to sanction pleas.
- plea bargaining significantly reduces the time needed to prosecute a case; thus prosecutors and judges can show a high caseload.
- pleas are used to keep cases away from lazy or incompetent prosecutors or judges.
- pleas are used to avoid imposition of penalties that attorneys believe are too harsh.
- the prosecutor may use plea bargaining to save a weak case from losing at trial.[31]

A growing number of criminal justice professionals find significant disadvantages in the continuation of plea bargaining procedures. Objections most often raised include

- pleas circumvent the intent of the legislature in establishing penalties for crime.
- defendants who may be innocent are coerced into plea bargaining through fear of conviction.
- pleas breed public disrespect for the law because of the common perception that pleas lead to light sentences.
- the proper functioning of judges and prosecutors is blurred as prosecutors assume judicial responsibilities through pleas.
- criminals who plea bargain are returned quickly to the streets where they can commit more crime.[32]

Although the Supreme Court has found plea bargaining acceptable practice if conducted in a fair and orderly manner, a number of states have placed restrictions on its use. Alaska has barred plea bargaining since 1975. Attorney Marv Braverman notes the results:

> In a study released in July 1980, the Alaskan Judicial Council compared the criminal justice system in Anchorage, Fairbanks, and Juneau during the years both immediately preceding and following the state's 1975 plea bargaining ban. The council found that the ban did not cause court processes to bog down (these processes actually accelerated). Defendants continued to plead guilty at about the same rate. Although the trial rate increased substantially, the number of trials remained small.[33]

North Carolina and New York have also placed restrictions on the use of plea bargaining as did California in its Career Criminal Prosecution Program. This program "screens all defendants, isolating repeat offenders who then are prosecuted by a special unit. Although defendants in the program are not offered bargains, most of them still plead guilty. In the program's second year, only 20 percent of the cases of career criminals went to trial, compared with 16 percent of the group passing through the regular system."[34]

Modification and reform of plea bargaining procedure is an important area for consideration in any discussion of the justice system. Since the criminal court judge must sanction each plea, procedural changes could drastically alter the use of the technique.

Pretrial Publicity

Two provisions in the Bill of Rights clash in the issue of pretrial publicity. The Sixth Amendment guarantees the accused a fair trial, while the First Amendment provides for a free press as well as the concept of access to information. A series of Supreme Court cases have supported the right of a trial judge to close pretrial hearings under certain circumstances. After the precedent-setting *Gannett* decision, trial judges agreed to about half of the fifty requests for closure. Trial courts also issue gag orders that restrict the comments trial participants can make to the press. If enforced, these procedures reduce the flow of possible prejudicial information to the media. Only in rare instances may a court constitutionally issue an order directly restraining the press from publishing information, even if it reflects adversely on a defendant.

Against this background of protecting both the rights of the accused and the media and its sources lies a debate on what type of information is prejudicial to fair trial rights and what remedies are appropriate. Professor Don Pember of the University of Washington lists the type of information most attorneys believe is prejudicial to the accused:

- confessions or stories about alleged confessions that a defendant is said to have made.
- stories about the accused's performance or refusal to take lie detector tests.
- publication of past criminal record of the accused.
- stories questioning the credibility of witnesses.
- information about the defendant's character, associates, or personality.
- stories that inflame the public.[35]

A study conducted by Professor Siebert of Michigan "reported that judges believed publication of criminal records, performance on tests, and information about confessions were potentially the most damaging kinds of stories."[36] Empirical support for these fears has been published:

> In late 1973 two social scientists at Columbia University's Bureau of Applied Social Research, Allen H. Barton and Alice Padawer-Singer, reported that a three-year study had produced evidence that jurors exposed to prejudicial news stories were as much as 66 percent more likely to find defendants guilty than jurors who read objective news reports.[37]

Despite a number of studies that produced similar findings, there is still disagreement over the impact of such publicity. Professors Tans and Chaffee note

> It has yet to be shown that there is any correlation between the amount of publicity given a case and the probability that the defendant will be found guilty or given a severe sentence. At another level, there is no evidence that a "prejudiced" juror is more likely to judge a defendant guilty or to hold out more strongly for such a judgment, plausible as that possibility may seem.[38]

Among those remedies often suggested to alleviate this potential problem are

- closure of pretrial hearings.
- court sealing of pretrial and trial papers, transcripts, and evidence.
- restraining orders on those involved in criminal proceedings.
- change of venue and trial postponement to reduce the impact of prejudicial publicity.
- voluntary guidelines and agreements with the press through press councils.[39]

Other Pretrial Issues

In addition to those issues already covered under pretrial procedures, several other areas are usually mentioned as requiring reform. Before a defendant is allowed to stand trial, the accused must be mentally competent to assist in his or her defense. This requirement has nothing to do with the insanity defense, but is a separate set of procedures which could lead to civil commitment proceedings of the accused. These procedures used to determine competency "may result in an increased infringement of the rights of the accused. Bail is usually denied during the period of competency evaluation; the evaluation may take place in an unnecessarily restrictive environment; rights to a speedy trial are jeopardized; the commitment procedures are less stringent than civil commitment procedures and the defendant is usually held longer than necessary for an evaluation."[40]

Another issue surrounds compulsory psychiatric examinations for victim witnesses in rape cases. California's recent law barring such exams has been upheld in recent court tests.[41] Other reforms center on the use of new technology to speed up arraignments. Several experiments in speeding up the arraignment process are now operating in California. San Diego and Sacramento counties have closed circuit video-hookups between jail and courthouse. Defendants in misdemeanor cases may voluntarily select arraignment via television instead of appearing in person in court:

> Sheriff's officials expect the current 48- or 72-hour period between the time of arrest and arraignment can be reduced to perhaps 24 hours, thereby relieving overcrowding if some of the defendants are released following arraignment.
>
> The system also is expected to cut costs of transporting inmates to the courthouse, one block from the jail, and decrease the possibility of escape by inmates.[42]

Trial Proceedings

Most defendants never reach trial. However, virtually all those accused of a crime have the right to a trial by jury unless the offense is "petty." The accused in a criminal action has more rights than the defendant in a civil action, although there is a similarity between the procedural guarantees. Among the more important due process guarantees are

- defendant must be informed of the charges so he or she can prepare a defense.

- defendant must be given a speedy trial.
- trials are open, no secret tribunals.
- an impartial tribunal determines guilt or innocence.
- a jury must represent a fair cross section of the community.
- defendant has the right to confront and cross examine witnesses.
- the prosecutor may not knowingly use false evidence, hide or suppress evidence, or conduct the proceedings in a prejudicial manner.[43]

While trial procedures provide strong safeguards for both society and the accused, several areas are often mentioned as requiring reforms.

Insanity Defense

The finding that presidential assailant John Hinkley was not guilty by reason of insanity added fuel to the fire of reform of the insanity defense. President Reagan's proposed Criminal Justice Reform Act "would redefine insanity in the federal criminal code so that the party seeking to assert the defense of insanity would have to show that he did not have the capacity to know the nature of the act he was engaged in."[44] Montana and Idaho have abolished the insanity defense. At least eighteen other states have proposed statutory reforms to this defense in the past two years. *State Government News* in January 1983 reports:

> At least eight states have enacted legislation providing for guilty but mentally ill as an additional verdict alternative. These are Alaska (June 1982), Delaware (June 1982), Georgia (June 1982), Illinois (1981), Indiana (1980), Kentucky (June 1982), Michigan (1975), and New Mexico (March 1982). All of these statutes require that a defendant found guilty but mentally ill be provided with treatment in a mental institution or prison. Subsequent to the treatment, the defendant must complete the remainder of his or her sentence in prison.[45]

In addition to shifting the burden of proof to the defendant, other procedural changes would create a uniform test of insanity. Currently four different legal tests are used for insanity in United States' jurisdictions:

- incapable of telling right from wrong (M'Naghten rule)
- act was a product of mental disease or defect (Durham rule)
- ability to conform conduct to the requirements of the law (American Law Institution's Model Penal Code).
- act was the result of an irresistible impulse (modification of M'Naghten).[46]

The defense of insanity concedes that the accused committed the crime but should not be held accountable for his or her actions. Uniform standards are important since the insanity defense reflects the important concept that an individual is accountable for his or her own actions.

Cameras in Court

The issue of allowing television cameras in the courtroom to broadcast the proceedings has been litigated and legislatively debated for many years. Cur-

rently, the federal courts forbid any direct broadcast of proceedings while thirty-eight states permit some kind of camera or broadcast coverage of their courts. Each of these states, however, has its own procedures and regulations of media in court. None allows unrestricted access over the objections of either party. Much of the opposition to expansion of electronic media access comes from trial attorneys and judges. The arguments most frequently cited by opponents of broadcast media in the courtroom center on the impact of such coverage:

- broadcast coverage will invade the privacy of participants in a more dramatic fashion than other types of news coverage.
- witness's reputation could be damaged more easily since television heightens recognition and has lasting effects.[47]
- some witnesses may be reluctant to testify in the presence of cameras.
- since most judges are elected, they may feel undue pressure to allow broadcasts in questionable cases.
- most courtrooms are not designed to inconspicuously accommodate cameras.
- attorneys, judges, and witnesses might play to the cameras and the viewing audience and not pay attention to the trial.
- use of cameras may have an effect on the conscious or unconscious judgment of jurors.[48]
- only sensational trials will be broadcast, thus conveying a distorted view of the workings of the justice system.
- selective editing of trial coverage will present a distorted view of real trial proceedings.
- electronic coverage reduces a defendant's chance for a fair trial.

Those who favor increased access of the electronic media to the courts argue both the advantages of allowing media coverage and the lack of empirical support for the fears of opponents to such coverage. Proponents stress the following positive implications from media coverage of trial proceedings:

- television coverage can present a unique opportunity to educate the public about the justice system.
- media coverage would enhance the First Amendment's protection for freedom of the press.
- in court broadcasts would reduce the confusion of media coverage of major trials by reducing out of court disruption.
- respect for the functions of judge and lawyers would increase.

Those advocates who favor increased electronic coverage of trials observe that no one is in favor of unrestricted media access. The judge could bar coverage if he or she felt the presence of TV cameras would prejudice defendants or inhibit testimony. Most state procedures allow either party to object to such broadcasts and, by this objection, to veto court media coverage. Certain types of cases or testimony likely to violate privacy are exempt from coverage. Finally, most trials can be covered by newspaper or magazine reporters so the incremental problems associated with additional publicity are minimized.

Most of the scientific research indicates that many of the alleged problems feared with use of cameras in court fail to materialize. "Empirical evidence gathered in Washington, Wisconsin, Florida, California, Louisiana, and Nevada between 1975 and 1979 points to broad but consistent conclusions about the impact of news cameras on trial participants and the trial process."[49] Indeed, extensive evaluation of cameras in Florida courts disproved most fears of their use:

> At the conclusion of the year of experimentation it had ordered, the Florida Supreme Court saw none of the adverse effects which opponents had predicted—grandstanding lawyers, posturing judges, intimidated witnesses, distracted or fearful jurors. The court concluded that "the assertions are but assumptions unsupported by any evidence. No respondent has been able to point to any instance during the pilot program period where these fears were substantiated."[50]

Cameras may add little to the already prejudicial nature of judicial proceedings. Susanna Barber, a professor of mass communication at Emerson College, notes

> However, the large quantity of available literature indicates, at a minimum, two very important points. First, that many of the prejudicial behaviors said to result from the presence of cameras in courtrooms are, in fact, operative in the courtroom regardless of the introduction of cameras. Second, that many unfair aspects of trials are not attributable to broadcast news coverage, but to the nature of the trial process in general.[51]

Indeed, Dr. Barber notes that the presence of electronic devices may increase the fairness of a trial. "It does not seem unreasonable to suggest that news camera coverage has the potential to make trials more rather than less fair: with the added public scrutiny that accompanies the eye of the camera, some of the blatant prejudices discussed earlier might be diffused, if not eliminated."[52]

TV coverage of court proceedings is an appropriate issue for debaters to investigate further. The large number of responses to media access to the trial provides arguments on both sides of the issue. The variety of state procedures regulating electronic coverage also establishes a presumptive case for uniform standards.

Testimony

Much of the information introduced in a criminal court comes as testimony offered by witnesses. It is a well-accepted conclusion that eyewitness identification of an accused is one of the most persuasive forms of evidence in jurors' perception of guilt. Yet, this type of evidence is also among the most unreliable. Witnesses are usually poor observers of a crime situation, eyesight is sometimes poor, viewing conditions are suspect, susceptibility to suggestion is high, and memories often fade. These factors contribute to promote procedural reforms which would restrict such eyewitness testimony without other supporting evidence.

Another form of testimony recently criticized is the overreliance on expert witnesses, especially psychiatric testimony. Journalism Professor Roberta Shell notes the growth of such testimony:

> During the last several decades, courts have become increasingly willing to call for and rely on psychiatric testimony when trying to answer extremely difficult legal and moral questions. Psychiatrists in turn have come forward with new, more complex, and at times bizarre explanations for human behavior. Today, "forensic psychiatrists" (defined as psychiatrist in the service of the law) have crucial input in deciding, for example, which parent should have custody of the children in divorce cases, whether an elderly person must be involuntarily committed to a mental hospital, whether a convicted criminal should go to prison or a psychiatric facility, and, most dramatically, whether a person convicted of a capital offense should go to jail for life or be put to death.[53]

Critics claim that such diagnosis is guesswork and that there is "no conclusive evidence proving that a psychiatric observation or opinion is any more reliable than one offered by a layman using common sense and everyday experience."[54] The resulting problem is that juries tend to view expert testimony as more credible than non-expert testimony. The problem is compounded since such witnesses receive special treatment under the rules of evidence.

Several procedural remedies are available to offset this bias. These reforms range from barring expert witnesses entirely to changing the rules of evidence. Herbert Fingarette, a professor of philosophy at University of California, Santa Barbara, argues

> I do not think the experts should be allowed to testify on the same issue that the jury is supposed to decide. The experts should give information about the person, factual, descriptive, and diagnostic information. But such questions as did the person appreciate the criminality of his acts, and could the person conform his conduct to the law? are crucial legal questions, and, as such, they are for the jury to decide. It would be useful if the courts were not to allow the experts to comment on that question.[55]

A third type of testimony is provided by use of videotape, picturephone, teleconferencing, film, and audiotape. Dr. Eshelman, chair of the mass communication department at Central Missouri State University, observed

> In numerous states audiotape recordings, motion pictures, and videotapes have been admitted as evidence. Such use, however, is limited by local jurisdictional authority, which must be ascertained previous to the proposed or actual recording.
>
> An increasing number of states and courts are becoming receptive to these alternative methods of introducing testimony and evidence in their search for truth.[56]

The possible range of such systems is virtually limitless:

> Video has the potential for improving the administration of justice. It is capable of reducing costs, accelerating the process, and presenting the "whole" truth. As the use of video mushrooms in our beleaguered judicial system, the traditional concept of training tapes will be augmented and

> surpassed by imaginative and innovative uses: videotaped depositions, testimonies, confessions and trials; effective teaching tools for students of the law, court employees, judicial administrative personnel and the public; and, efficient methods of collecting vital facts and information and presenting them in a fair manner.[57]

U.S. Circuit Court Judge Joseph Weis enumerates other advantages including

- reduction in the cost of litigation by speeding up the trial, reducing travel expenses, and lawyers' time.
- greater availability of evidence from experts who wish to testify but cannot travel.
- closed circuit TV would reduce judges' travel time by allowing conferences and motions to be broadcast to his or her chambers.[58]

A final form of testimony that has engendered a great deal of debate in the legal community is the use of hypnosis. Hypnosis of witnesses has been a tool of law enforcement investigation for many years. Examples of its effectiveness in refreshing the memory of eyewitnesses can be startling. Despite these successes, a number of legal scholars are concerned about the introduction of such evidence at trial. Bernard Diamond, professor of psychiatry and law at the University of California, writes

> A witness cannot identify his true memories after hypnosis. Nor can any expert separate them out. Worse, previously hypnotized witnesses often develop a certitude about their memories that ordinary witnesses seldom exhibit. . . . The hypnotist often unconsciously cues the subject into stating certain things. Then, when they prove correct, the hypnotist believes the memories to have been recalled independently by the subject. . . . In fact, the subject may have been responding merely to cues of the hypnotist, who knew all along from other sources what the actual facts were.[59]

Other problems with hypnosis include the lack of an agreed-upon definition, possible contamination of the witnesses' memory, and the difficulty in assessing the credibility of the witness in a hypnotic state. Procedural reforms are suggested by Syracuse University Law Professors Alderman and Barrette:

> the inherent unreliability of hypnosis at this time, suggests that nothing but uncertainty and argument can be gained by the continued use of hypnosis in the criminal justice system. We believe that a total per se exclusionary rule, applicable to both parties, is preferable to the continued possibility of use in any case by the prosecution. Short of an exclusionary rule, however, there is a critical need for adoption of strict rules of use, to curtail in the best available way the system's use of a process inherently suspect, because it deprives litigants of their rights.[60]

Other forms of testimony in addition to those mentioned should be researched on this debate resolution. For example, use of informants as primary witnesses in criminal cases has been questioned. Also, entire categories of potential witnesses are unable to testify even if they have knowledge about criminal activity. These privileged relationships include husband-wife, doctor-patient, and priest-penitent. Some jurisdictions also recognize privileged com-

munication status for social workers, psychologists, and counselors. A final issue is presented by the use of grants of immunity to compel testimony. Such procedures have been indicted by a number of legal commentators.

Exclusion of Evidence

The final illustration of a major case area representing trial procedures is the exclusion of certain types of evidence. In general, the justice system seeks to consider as much relevant evidence as possible before a legal decision is reached. However, certain categories of germane information are not allowed to be presented during a trial. An example of a new category of excluded evidence is provided in rape shield laws. Michael Graham, professor of law at the University of Illinois, explains

> Over the last two decades, Congress and numerous state legislatures have perceived a need to protect the privacy of an alleged rape victim from unwarranted public intrusion and to make the prosecution of rape cases more equitable for rape victims. In addition, the ordeal a woman faces during trial was felt to account for the reluctance of many women to report a rape or to participate in the prosecution of an alleged rapist. Legislative response took the form of statutes limiting to a great extent the admissibility of evidence as to the past sexual behavior of the alleged victim.[61]

Another recent modification demonstrating a move toward allowing previously inadmissible evidence at a trial is represented by recent court decisions on the use of polygraph results. "While the results of lie detector tests are not routinely accepted as admissible evidence, a number of states permit their introduction in some circumstances (e.g., California, Indiana, Ohio, Wisconsin). Moreover, results of lie detector tests have been held as admissible according to the trial courts' discretion in several federal circuits."[62] A recent California Court of Appeal's decision, while not ruling that polygraph results constitute admissible evidence did indicate that they can no longer be automatically excluded. The state will be required to pay the fee for such tests for indigent defendants and for the extra court time required to adjudicate issues raised by introduction of this evidence. In addition to increased costs, Rex Beaber, an assistant professor of medicine at UCLA, believes the accuracy of such tests is in doubt:

> The polygraph industry claims an impressive but exaggerated accuracy rate of about 90 percent. Even accepting this figure poses a real dilemma. If juries accept polygraph results, they must erroneously let free 10 percent of all guilty suspects. If they ignore the results, the time and money spent putting on the evidence was wasted.[63]

Other experts believe the actual rate of accuracy is significantly below this 90 percent level. Kleinmuntz and Szucko conclude:

> We have presented evidence showing that polygraph judges have a high rate of misclassification and that the particularly damaging by-products of these errors are false positive judgments which may label as many as 50 percent of innocent suspects as guilty. We have also argued that there are

> motivational factors that bias polygraphers in a way that causes false positive errors.[64]

A last area of inadmissible evidence is that which is the product of an illegal search or seizure. This doctrine, known as the exclusionary rule, operates under the theory that the suspect goes free if the constable blunders. This rule is one of the most hotly contested issues in criminal justice literature. "Critics of the rule generally contend that the rule impedes effective law enforcement, places an unreasonable burden on law enforcement officers to master the intricacies of the fourth amendment, and promotes disrespect for law and order by releasing criminals on technicalities."[65] Advocates of the rule stress three major issues:

- it is necessary to protect individual rights.
- judicial integrity demands that the court refuse to sanction illegal activity.
- exclusion of this evidence will serve to deter fourth amendment violations.[66]

All these assumptions on both sides of the issue can be effectively challenged. One of the major questions posed by defenders of the exclusionary rule is what will replace it if the rule is eliminated? Among legal commentators the following remedies emerge as either supplements or replacements for the exclusionary rule:

- *Good Faith Test*—the rule would not operate if the law enforcement official acted in reasonable good faith belief that the search was constitutional.
- *Damages*—the police officers who engage in illegal searches would be civilly liable for their behavior.
- *Disciplinary Proceedings*—the law enforcement official would be subject to discipline by the appropriate government agency for conducting illegal searches.[67]
- *Ombudsman*—a criminal procedures ombudsman would investigate instances of alleged police misconduct, publicize the results, and authorize appointment and payment of private counsel to sue the responsible officials.[68]

Despite the widespread belief that the exclusionary rule results in the unwarranted release of thousands of felons, in fact, it is seldom invoked. A GAO study reported: "illegal searches and seizures accounted for 0.4 percent (four in 1,000) of the cases United States attorneys declined to accept for prosecution and apparently accounted for roughly 0.7 percent of the criminal cases dismissed or criminal defendants acquitted after the prosecution commenced. Thus, approximately eleven of every 1,000 federal criminal defendants may be set free by the operation of the rule."[69] A study by the Institute for Law and Social Research that examined the operation of the rule in Washington, D.C., discovered

> in Washington, D.C., prosecutors declined to proceed with approximately 1 percent of all arrests because of Fourth Amendment violations, 77 percent

> of these rejections occurring in narcotics cases and other cases classified as "victimless crimes." Of the cases dropped by prosecutors after initial acceptance, less than 1 percent were attributed to improper police conduct; none of these cases involved crimes classified as violent.
>
> In its multicity study, Inslaw concluded that issues relating to the exclusionary rule "may be substantial in terms of legal theory, (but) they appear to have little impact on the overall flow of criminal cases after arrest."[70]

A number of legal scholars have concluded that additional information is needed on the effects of the rule and the impact of its alternatives before any policy decision is contemplated.

Jury Research

The assumption of a guarantee of a fair trial before an impartial tribunal has been challenged through the research efforts of a group of social scientists who have examined the legal process. Rather than acting as a passive unbiased judge of facts, most juries represent a very active microcosm of society's biases. Among those areas investigated by researchers are studies dealing with jury size, jury instructions, *voir dire*, effects of publicity on verdicts, the impact of inadmissible evidence, the effect of videotaped testimony, the effects of defendants' characteristics on jury decisions, the influence of juror traits on verdicts, and the effect of unanimous or non-unanimous verdict requirements.[71] The courts are increasingly willing to incorporate these research findings into their decisions. For example, recent court rulings that have reduced the size of state juries, repealed the requirement for unanimous verdicts, allowed admission of videotaped testimony, and permitted states to allow cameras in court all cite research results which indicate that such actions are either desirable or, at least, have no significant negative consequences.

Certainly, these research studies can point policy makers in the direction of needed reform. Research indicates that many instructions given by the judge to the jury are incomprehensible to those listening. Such information should be used to rewrite these instructions in plain language using only modest linguistic changes. Otherwise, Law Professor Robert Charrow notes, incorrect verdicts may result:

> If jurors are unable to adequately comprehend the law that they must apply in reaching their verdicts, it may be that many verdicts are reached either without regard to the law contained in the jury instructions or are reached using the incorrect law. In short, if jurors cannot understand the judge's instructions, the vitality of the jury system itself is open to serious question.[72]

Other statistical data can be used to demonstrate the need to modify methods used to select a jury pool. This practice would ensure a more representative jury yielding a better reflection of the makeup of the whole community.[73]

Some problems occur with the generalization or ecological validity of extrapolations based on most legal research. Speech Communication Professor

Gerald Miller of Michigan State University notes some of the more obvious problems:

- most research has used college students, not actual jurors. College students are generally younger and better educated than most jury panels.
- students are research wise and they will not react to experimental conditions the same as actual jurors.
- the amount of information presented is considerably less than in a real trial.
- many experiments use audiotape or a written synopsis of important information instead of simulating live trial situations.
- many experiments do not provide for full deliberations.[74]

Each of these factors independently contributes to a distortion of the application of this research to the vagaries of the legal process. Thus, debaters using such studies must be extremely careful in the extrapolation of their data.

Sentencing

One of the major reforms in the criminal court system over the past five years has been changes in sentencing procedures. Jurisdictions have experimented with creative punishment which emphasizes alternatives to incarceration. Ronald Boostrom and Joel Henderson, professors at San Diego State University, offer this insight:

> The concept of creative punishment has been defined as: an attempt to design a mode of constructive punishment which considers the needs and characteristics of the offender and his motivation. This focus allows for a personalized and structured sentencing plan to be developed which meets the needs of the offender, justice, and community or victim reparation. While rehabilitation is a component of this concept, creative punishment also includes restitution and retribution as important components of sentencing. Such a conceptualization allows for a movement toward recognizing other forms of punishment besides traditional incarceration.[75]

Juxtaposed against this trend to individualize punishment is a move to "get tough" with convicted offenders. This attitude is manifested in mandatory sentencing laws, which eliminate judicial discretion by requiring imprisonment for selected crimes, and by determinate sentencing, which sets the term of imprisonment while allowing judicial discretion to prescribe the penalty.[76] By 1982 over half of the states had some form of mandatory and/or determinate sentencing laws. Both of these statutory provisions reduce the flexibility of the judge to sentence the convicted felon. Evaluations of these new procedures reveal mixed results. Mandatory sentencing results in plea bargaining to a reduced charge in a number of cases,[77] and evidence exists that mandatory sentencing results in greater recidivism rates and leads to more crime.[78] However, additional studies are needed before the impact of these statutory changes becomes clear.

Capital Punishment

By the end of 1979, thirty-seven states had capital punishment statutes. Although the sentence of death has been carried out only four times in the past fourteen years, it is still a hotly-debated legal and moral issue. At the end of 1980, "American prisons held 714 persons under sentence of death; newspaper reports in early 1981 placed the total at around 750. . . . Public opinion, furthermore, is strongly in favor of capital punishment: about two-thirds of all adults indicate support of the death penalty for murder, and this proportion has been increasing in recent years."[79]

The justification for the death sentence is twofold: it strengthens deterrence, and society requires such a drastic penalty. Proponents of the deterrence effect argue that swift and consistent application of the death penalty would deter others from committing murder and other serious crimes. Studies conducted by Ehrlich and data reviewed by Yunker indicate that capital punishment does decrease the homicide rate. Professor Yunker reviewed a variety of studies and concluded:

> To my mind, the evidence suggests that were the death penalty to be regularly inflicted upon convicted murderers, the homicide rate in this country would be a fraction of what it is today, and a large proportion of the over 20,000 annual victims of homicide would be saved. In addition, I would expect substantial reductions in all other types of serious crime.[80]

These conclusions have been challenged by a number of other researchers and legal commentators. All studies on the deterrence effect are subject to methodological problems. In addition, several authors attempted to replicate Ehrlich's work but most discovered no evidence of deterrence. Other researchers have utilized different methods to reach this conclusion:

> William Bailey provided evidence that increasing the "celerity" of capital punishment—the speed with which executions are carried out—is not likely to produce deterrent effects. Kilman Shin, in a little known but excellent volume, has undertaken numerous tests of the deterrence hypothesis (some involving cross-national data), all with negative results. Gary Kleck has published a brilliant study suggesting that, in the United States, gun ownership has a large impact on homicide rates while executions have no significant impact. Finally, a recent paper by Bowers and Pierce uses monthly homicide and execution rates (1907–63) for the state of New York and finds that, rather than acting as a deterrent, executions may actually *stimulate* homicide.[81]

The view that society demands capital punishment is most persuasively stated by Harvard's James Q. Wilson. However, other legal commentators have argued the validity of this social response. Whether the state should be the active agent in taking a human life is a profound issue which defies easy answers, but it is certain to require the best research efforts of the debater on this resolution.

Victims

Part of the move to creative punishment represents a device to have the criminal make restitution to the victim. Restitution can take the form of monetary payments or service hours to compensate for injury or loss resulting from the commission of crime. Too often the criminal justice system seems to be more concerned with the rights of the accused than the well-being of the victims of crime. State and local governments have established a number of programs to help the victim. A partial list of such programs includes:

- establishing victim-citizen units in police and prosecutors' offices.
- compensation programs to cover uninsured medical losses and lost wages.
- authorizing lawsuits against the criminal responsible for the injury.
- set training programs to make the police more sensitive to the needs and fears of victims.

In addition to these programs, procedural changes are needed in sentencing to encourage due consideration for the victims of crime. For example, fines of criminals could be used to fund compensation programs.

> In some states laws have been adopted establishing compensation programs, but legislatures have failed to fund these programs, which renders the effort meaningless.
>
> One of the most successful new concepts in funding compensation programs is the penalty assessment plan, whereby persons convicted of a crime are assessed a certain amount which goes directly to the compensation program.[82]

Robert Grayson of the New Jersey Council on Crime Victims offers another suggestion:

> Many states are beginning to take a strong stand on restitution in property loss cases as well as in personal injury cases. Stronger statutes mandating restitution as an alternative to incarceration have brought the issue to the forefront of public attention and have been generally successful.
>
> Restitution has also been ordered as part of a sentence which includes a jail term. In cases of fraud and "flim-flams," restitution is frequently ordered so that the victim, who may have lost a life's savings, is truly assisted.[83]

Thus, creative use of sentencing procedures could significantly aid in balancing the scales of justice. Such an approach needs uniform standards. Grayson argues, "The only way to protect the rights of victims is to guarantee that victim-witness programs, including victim advocacy units, are a permanent, mandatory part of the criminal justice system in all fifty states."[84]

Juvenile Crime

Increasing alarm over the problem of serious juvenile crime has spurred a reevaluation of the special status that juveniles hold in the criminal justice

system. The trend is toward treating older juveniles accused of major crimes as adults who will be tried in criminal rather than juvenile courts.

> In the adult system, incarceration is now justified on the ground that it incapacitates, that is, keeps offenders from committing further crimes for the duration of the sentence. Rehabilitative and educational programs within prisons have been cut and security measures increased. This attitude has also affected the treatment of juveniles. Stirred by accounts of youths who go through the juvenile system, are released and then commit heinous acts, the public sees juvenile crime as a serious menace.[85]

Trial in adult courts for a few dangerous offenders is supported by the statistics of juvenile crime. Most major crimes are committed by a hard core of repeat offenders. A study of 10,000 boys conducted by the Center for Studies in Criminology and Criminal Law for the University of Pennsylvania indicates that 627 chronic recidivists (arrested five or more times before age eighteen) committed over 50 percent of all offenses registered for the initial study group. Marvin Wolfgang, director of the Center, also noted the type of crimes committed:

> The 627 chronic offenders accounted for 63 percent of the FBI's Uniform Crime Reports Index offenses (criminal homicide, forcible rape, robbery, burglary, larceny, motor vehicle theft) committed by members of the cohort, and an even higher proportion of the most serious offenses—71 percent of the homicides, 73 percent of the rapes, 82 percent of the robberies and 69 percent of the aggravated assaults.
>
> A follow-up study of a 10-percent sample of the birth cohort shows that those who had no juvenile arrest record had about an 18 percent chance of at least one arrest between eighteen and thirty. But among chronic juvenile offenders, eight out of ten had adult arrests, usually for serious and violent crimes.[86]

While changing the law to allow these chronic dangerous offenders to be tried as adults is a popular reform measure, other procedural changes are needed. Status offenders who are accused of acts such as curfew violations or drinking under age should be diverted from the criminal system to community-based services. Also, courts should reexamine the secrecy surrounding juvenile justice. Closed proceedings, sealed records, and no publicity may not be the best way to reduce juvenile crime. Current barriers to dissemination of information on such offenders must be modified. Lawrence McMicking of Trident College argues:

> We are no longer protecting the teen-age felon, but allowing him to operate with immunity and without fear of prosecution.
>
> The individual states and the Congress must begin a concentrated effort to reverse the *status quo*. Fingerprinting and photographing of juvenile criminal suspects can be very effective in the battle against juvenile criminal activity. The courts must be furnished with complete records of juveniles before setting their bail or bond prior to sentencing. This is a matter of routine in some courts and unheard of in others. The Congress should

> require the FBI to accept and gather fingerprints of all persons that are arrested regardless of age.[87]

All of these practices are now illegal and would require major changes in the *status quo*. The treatment of juvenile offenders is an area that deserves careful examination during the course of the debate year.

Conclusion

This concludes the chapter on procedures in criminal courts. There are many other procedural issues that arise in our adversary system, but the purpose of this publication is to provide a focus for an initial examination of the topic of the United States justice system.

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